SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 68.

CHARLES H. UTERMEHLE, PLAINTIFF IN ERROR,

vs.

MAMIE R. NORMENT ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

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STATEMENT OF THE CASE.

George W. Utermehle died in the city of Washington on April 16, 1889, owning real estate of the value of about one million dollars (118), and possessed also of a large personal estate. He left a widow, Sarah Utermehle. His heirs and next of kin were his two daughters, Mamie E. Norment, wife of Samuel Norment, and Rosa (or Rose) Taylor, wife of Dr. Leroy M. Taylor, and a grandson, Charles H. Utermehle He left a will which he executed December 7, 1887, by which, after giving $9,000 to certain nieces in Germany, he devised to his grandson, Charles H. Utermehle, the Young law building, in Washington, D. C., and also the principal and interest due and to become due on a certain $750 note. He gave to his wife, Sarah Utermehle, all the rest of his personal property, and also devised to her the family residence and the surrounding grounds in square numbered 765, in

the city of Washington. All the rest of his real estate he gave to his two daughters, Mrs. Norment and Mrs. Taylor, as tenants in common, "to be equally divided between them." He also directed that if either of his daughters should be unwilling to divide the real estate or should be dissatisfied with the division made, the one who was not satisfied should have five dollars, and the whole of the real estate should go to the other daughter or her heirs. He appointed his wife the executrix of his will (116, 117).

On the 26th day of April, 1889, Sarah Utermehle, as executrix, filed a petition in the supreme court of the District asking that this will be admitted to probate, and that letters testamentary should be issued to her (1). At the same time, apparently, there was filed a waiver of citation, signed by Mrs. Taylor, Mrs. Norment, and Charles H. Utermehle (21). On the same day the will was admitted to probate, the bond of the executrix being fixed in the sum of $20,000 (2). On May 3 following, the order was modified by providing that the bond of $20,000 should be "conditioned for paying all just debts of, and claims against, the deceased, and also all damages which shall be recovered against her as executrix, and also all legacies bequeathed by the will" (3).

This special bond was authorized by the Maryland act of 1798, chapter 101. Section 6 of subchapter 14 of that act provided:

"6. No executor shall be obliged to exhibit any inventory, or account, provided he will give bond, instead of the bond hereinbefore directed, with such security, and in such penalty, as the court shall approve, to the State of Maryland, to be recorded and sued as before directed, with condition 'for paying all just debts of, and claims against, the deceased, and all damages which shall be recovered against him as executor, and also all legacies bequeathed by the will,' provided the said executor be residuary legatee, or provided the residuary legatee of full age, shall notify his or her consent to the court; and in case such bond be given by an executor, he shall be answerable for all debts, claims and damages, recovered against him as executor; and if suit be

brought against him as executor, the judgment shall be for the whole sum found by the jury, or otherwise ascertained, and execution may issue, and have effect, as if he were sued in his own right; and any legatee shall be entitled to recover the full amount of his legacy, either in a suit upon the said executor's bond, or in a suit in chancery, as is usual in case of legacies, or in an action on the case, in which the giving of such bond shall be considered as an assent to the legacy."

On May 14, 1890, the executrix filed her final and only account, setting forth that she had paid all the debts of the estate and all expenses of administration and all the legacies (4). With her account she filed proper receipts from the legatees, including one from Charles H. Utermehle, showing the payment to him in full for the principal and interest of the note bequeathed to him, the sum of $2,116.88 (4, 5).

It was a conceded fact in the case that Charles H. Utermehle immediately after his grandfather's death took exclusive possession of the Young law building under the will, and held it in that way until about a year afterwards, when he sold it for $20,000 (66, 90).

Mrs. Normeat and Mrs. Taylor, in accordance with the provisions of the will, divided between them nearly all the real estate (except the property in square 765, devised to the widow). The remainder they sold and divided the proceeds.

Sarah Utermehle died on March 13, 1893. She left a will by which she divided her estate equally between Mrs. Taylor, Mrs. Norment, and her grandson, Charles H. Utermehle, directing that any sum or sums which she had advanced to either of her daughters or to her grandson during her lifetime should be charged against their respective shares of her estate (119). She appointed Mrs. Taylor and Mrs. Norment executrices. They filed a petition accordingly in the supreme court of the District on the 17th of March, 1893. With the petition was a waiver of citation signed by them-

selves and also by Charles H. Utermehle. On the same day the will of Sarah Utermehle was admitted to probate (120). In the distribution of the personal estate of Sarah Utermehle under her will each of the three beneficiaries received the sum of $84,256.87, including advances which had been made to each of them by Sarah Utermehle during her lifetime (91, 92, 122).

By an act of Congress approved June 8, 1898, the supreme court of the District of Columbia, holding a probate term, was authorized for the first time to admit to probate wills of real estate (30 Stat., 436). The same act prescribed the procedure in contested will cases and made the judgment in such cases binding on everybody, and provided that wills which had been admitted to probate before the passage of the act as wills of personal property should be unassailable unless proceedings were instituted within one year thereafter.

On the 9th day of June, 1900, over eleven years after the death of his grandfather, Charles H. Utermehle filed a petition averring that when George W. Utermehle executed his will he was of unsound mind, and that the execution of it had been procured by undue influence, fraud, and coercion, and praying, accordingly, that probate of the instrument as a will of personalty should be set aside and that it might be refused probate as a will of real estate.

On the 19th day of July, 1900, Mrs. Taylor and Mrs. Norment filed an answer to this petition, in which they denied the charges of unsoundness of mind, undue influence, fraud, and coercion (7–8), and set up the 10th section of the act of 1898 [see page 4 of this brief] as a bar to further proceedings by Charles H. Utermehle (8–9). They also averred that by accepting the provisions in his favor in the will of George W. Utermehle and in the will of Sarah Utermehle and by divers other acts Charles H. Utermehle was estopped to controvert the will of his grandfather (9–10).

On the 17th of November, 1900, the caveator excepted on

a variety of grounds to so much of the answer of Mrs. Taylor and Mrs. Norment as referred to the statute of limitations (32).

When Mrs. Norment and Mrs. Taylor on the 19th day of July, 1900, filed their answer to the petition of Charles H. Utermehle, they, at the same time, filed a petition by which they sought to have the will of their father admitted to probate as a will of real estate (11–14). In this petition they again set up the facts upon which they relied to establish that Charles H. Utermehle was estopped to contest the will of his grandfather, and averred that notwithstanding this he had filed his petition and caveat of June 9, 1900, and also had brought suit in ejectment against Mrs. Taylor by which he sought to recover a one-third interest in over thirty parcels of real estate devised by George W. Utermehle to the petitioners.

On the 27th day of September, 1900, Charles H. Utermehle filed a petition in which he referred to the application to have the will of George W. Utermehle admitted to probate as a will of real estate and repeated his charges of unsoundness of mind, undue influence, fraud and coercion, and asked the court to frame issues accordingly for trial by jury (17–18). On October 30, 1900, by way of further answer to the caveat of September 27, 1900, and in addition to the matters set forth in their petition of July 19, 1900, Mrs. Norment and Mrs. Taylor plead section 10 of the act of 1898 as a bar to any opposition on the part of Charles H. Utermehle to the admission of the will to probate as a will of real estate (19–20).

On the 3d of November, 1900, Charles H. Utermehle filed a paper in which was set out at great length his reply to the claim of estoppel (22–29). The contents of this paper will be fully considered below in discussing the questions raised by the bill of exceptions in this case.

On November 17, 1900, Charles H. Utermehle excepted on a variety of grounds to the plea of the statute of limita-

tions filed by Mrs. Norment and Mrs. Taylor on the 30th of November, 1900 (31). On the 7th day of January, 1901, the caveatees joined issue with the caveator on his answer of November 3 to the plea of estoppel (33).

On January 22, 1901, Mrs. Taylor died. Under her will and an agreement in relation thereto between her husband and her son, Leroy M. Taylor, Jr. (35–37), they and the children of Leroy M. Taylor, Jr., became parties in interest and were accordingly made caveatees in the place of Mrs. Taylor (33–38).

On March 27, 1901, six issues were framed in the case which involved the submission to a jury of the questions of estoppel, soundness of mind, undue influence, fraud, and duress or coercion. By the same order the question of the application of the statute of limitations and other questions of law which could have been raised prior to the framing of the issues and not passed upon by the court during the trial of the issues were reserved by the court for future determination (38–39).

After a trial which lasted for several weeks, the court sustained a motion on behalf of the caveatees to instruct the jury to find in favor of the will upon all the issues upon the ground that the evidence submitted on behalf of the caveator showed that he was estopped to controvert the will (160–161).

The trial judge, Mr. Justice Barnard, filed a written opinion giving the grounds upon which he sustained the motion (161–170).

During the trial certain evidence of alleged declarations by the testator in favor of the caveator were offered, and objection thereto sustained under the ruling of this court in the Holt will case (Throckmorton *vs.* Holt, 180 U. S. 552 (53–56).

A verdict in favor of the will on all the issues having been rendered by the jury under the instruction of the court, the caveator filed a motion for a new trial, which was overruled,

the court by the same order confirming the order of April 26, 1889, admitting the will to probate as a will of personalty, and also directing that it be admitted to probate and record as a will of real estate (43).

From this judgment the caveator, Charles H. Utermehle, appealed to the Court of Appeals of the District of Columbia. That court affirmed the judgment. The opinion of the Court of Appeals, which was delivered by Mr. Justice Morris, is in the record (180 to 192). The caveator then brought the case here by writ of error.

While the case was pending in this court Leroy M. Taylor, Senior, died testate. The Washington Loan and Trust Company, as executor and trustee under his will, has been made a party in his place. His sole heir-at-law, his son, Leroy M. Taylor, Jr., was already a party.

ARGUMENT.

I.

THE STATUTE OF LIMITATIONS.

Section 10 of the act of June 8, 1898 (30 Stat., p. 437), is as follows:

"SEC. 10. That the record in the office of the register of "wills for the District of Columbia of a duly certified copy, "or transcript of the record of proceedings, admitting any "will or codicil to probate outside of the District of Columbia; "and the record in said office of any will or codicil heretofore "admitted to probate in said District, and which shall not have "been annulled or declared void according to the law prior to "the passage of this act, shall be deemed and held, at law and "in equity, as of the same and like force and effect as if "such will or codicil had been duly proved and admitted to "probate and record under and in accordance with the pro-"visions of this act: *Provided*, That the provisions of this

"section shall not apply to any proceedings at law or in "equity pending at the date of the passage of this act, or "commenced within one year after the passage of this act, "wherein or whereby the validity of such will or codicil is "or shall be called in question."

By section 6 of the same act it was provided that a judgment admitting a will to probate, subject only to proceedings in error, and to such revision as the common law provides, should be *res judicata* as to all persons, and that the validity of any such judgment should not be impeached or examined collaterally.

Hence, in those cases to which section 10 applies, after the expiration of a year from the passage of the act, a will admitted to probate prior to June 8, 1898, was placed on the same footing as a will to which a caveat had been filed and which had been adjudged valid after a trial of the issues raised thereby.

This section has not been construed either by the supreme court of the District of Columbia or by the Court of Appeals of the District in this case, or in any other case. The supreme court of the District in framing the issues in this case specially reserved the question of the application of the statute of limitations (59). As the verdict and judgment on the issues were in favor of the caveatees, it was not necessary for that court to consider the question so reserved.

In the opinion of the Court of Appeals in this case this matter is not referred to, although it was fully considered and argued in the briefs and in the oral argument in that court.

Prior to this act of 1898 the title to real estate in the District of Columbia was not barred by adverse possession until that possession had lasted for twenty years (Stat. 21, James I, chap. 16, sec. 1; Abert's Comp., 358). Consequently, prior to that date, even when a will devising real estate in the District had been fully proved and admitted to probate and record as a will of personal property, the title to all the real

estate covered by the will was left in doubt in all cases for twenty years, and in cases where infants and lunatics were concerned for a longer period. The difficulties experienced by examiners of title because of this omission in our laws and the efforts they made from time to time to have it remedied are well known. The records of Congress will show that section 10 of the act of 1898 was added thereto after the bill had been prepared by the Bar Association of this District and introduced in Congress. It is common knowledge that that section was prepared and its addition to the statute urged by Mr. Mahlon Ashford on behalf of a corporation engaged in the examination of titles to real estate in the District. The object of it is manifest. It was to require that any assault that was to be made upon wills theretofore admitted to probate and not then in contest must be made within one year thereafter. When that year elapsed, the right to contest was at an end.

It is true that while by section 5 of the act of 1898 any person actually served with process was required to file a caveat within one year thereafter or be barred, an exception was made in favor of parties outside of the jurisdiction who were served by publication, such persons being allowed two years, and that another exception was made in favor of person under twenty-one years of age, who were allowed one year after becoming of age to file a caveat, and that if section 10 be held to apply to wills of real estate probated before the act of 1898, no such exceptions would apply. But this is true of all wills admitted to probate before the act of 1898. As to wills of personal property only admitted to probate prior to the act of June 8, 1898, a caveat was required to be filed within one year after the passage of the act, whether the caveator were a minor or not, and whether he had been brought in by personal service or process or by publication. The distinction that Congress intended to make by section 10 was not between wills of personal and wills of real estate, but between

wills which had been admitted to probate before the act was passed, on the one hand, and those in which proceedings were pending at the date of the act or were begun thereafter, on the other hand.

It does not affect this conclusion that prior to the passage of this act the supreme court of the District, holding a probate term, had no jurisdiction of a will as a will of real estate. If the act had undertaken to give any effect as a will of real estate to the probate of a will before the act was passed, a question might, indeed, have arisen as to whether Congress could declare a will effective as a will of real estate because it had been admitted to probate as a will of personal property only by a court which had no jurisdiction of it as a will of real estate. But in this case Congress has not attempted to do that. It has simply fixed a period of time within which assaults upon wills must be made when the will was admitted to probate prior to June 8, 1898. As the bill stood before section 10 was inserted there was no statute of limitations as to wills previously admitted to probate, whether they were wills of personal property or real estate or both. This was a very serious defect in the bill. It may be argued that one year from the passage of the act was a short time within which to limit proceedings against all wills which had theretofore been probated in the District of Columbia; but that was a matter for Congress to pass upon. The period of one year so fixed is clearly not so short as would lead the court to hold that it is so unreasonable as to make the provision void. It is worthy of note in this connection that, although over six years have now elapsed since the act was passed, this is the only case in which a caveat has been filed to a will previously admitted to probate.

In Koshkonong *vs.* Burton, 104 U. S., 658, this court upheld an act of the legislature of Wisconsin which shortened the time within which an action upon a sealed instrument should be brought in that State from twenty years to six years, with the proviso that any such action

might be brought within one year after the act took effect. It was said in that case that the power is subject only to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect.

In Wheeler *vs.* Jackson, 137 U. S., 245, an act of the legislature of New York was sustained which reduced the time within which certain actions or special proceedings might be instituted, and allowed a period of only six months from the passage of the act for the bringing of actions which would otherwise be cut off by the shortening of the time.

To the same effect are Terry *vs.* Anderson, 95 U. S., 628–632; Mitchell *vs.* Clark, 110 U. S., 633–643, and People *vs.* Turner, 168 U. S., 90. In the last-mentioned case the act concerned was a statute of the New York legislature which provided that deeds from the comptroller of the State of lands in the forest preserve sold for non-payment of taxes should, after having been recorded for two years, and in any action brought *more than six months* after the act took effect, be conclusive evidence that there was no irregularity in the assessment of the taxes. The court held that this was a statute of limitations, but that it did not deprive the former owner of such lands of his property without due process of law.

It will not, of course, avail the caveator to say that he claims that he did not discover until more than a year after June 8, 1898, the evidence upon which he based his caveat. Whether he had sufficient evidence to go to the jury on this alleged late discovery is discussed further on in this brief. But even assuming the fact to be as he avers, the court cannot read an exception into the statute which the legislature did not see fit to place there. In a case decided by the

supreme court of errors of Connecticut in January, 1904, that court held that a statute which allowed only one year for an appeal from any order admitting a will to probate applied to a case in which the appeal was taken more than a year after the will was admitted to probate, although the appellant first learned more than a year after the probate that he was a legatee under a later will (Delahanty *vs.* Pitkin, 56 Atl. Rep., 881).

Since the foregoing was written the brief of the plaintiff in error in this court has been received. It is now suggested by opposing counsel that section 10 of the act of 1898 has no application to proceedings in the probate court, but affects only suits "at law or in equity." If this contention be correct, then we have this absurd state of things: The caveat can be sustained and the will may be set aside, yet in the ejectment suit which was brought against Mrs. Taylor by the plaintiff in error this section might be pleaded as a complete defense. And so in every other case a will might stand or fall in a probate court, yet the judgment of that court would have no effect at all in any proceedings which might be brought by the devisee to recover the property, if the will should be sustained. It is submitted that it cannot be supposed that Congress intended such an absurdity as this, and that the words "at law or in equity" should be construed as referring to legal proceedings in any court.

A case involving very similar considerations was before this court in the case of Ormsby *vs.* Webb, 134 U. S., 64. That case was a contest over a will in the probate term of the supreme court of the District, and after a final judgment in favor of the will the caveator brought the case up by writ of error. A motion was made to dismiss on the ground that the case was one of equity jurisdiction and should have been

brought up by appeal. In overruling the motion this court said:

"And we are of opinion that the last motion to dismiss, which proceeds upon the ground that this case is one of equitable cognizance to be reviewed here, if at all, only upon appeal, must also be overruled. It is, of course, undisputed that a final decree in equity, in the court below, cannot be reviewed here by means of a writ of error. But a proceeding involving the original probate of a last will and testament is not strictly a proceeding in equity, although rights arising out of, or dependent upon, such probate have often been determined by suits in equity. In determining the question of the competency of the deceased to make a will, the parties have an absolute right to a trial by jury, and to bills of exceptions covering all the rulings of the court during the progress of such trial. These are not the ordinary features of a suit in equity. A proceeding in this District for the probate of a will, although of a peculiar character, is nevertheless a case in which there may be adversary parties, and in which there may be a final judgment affecting rights of property. It comes within the very terms of the act of Congress defining the cases in the supreme court of this District, the final judgments in which may be re-examined here. If it be not a case in equity, it is to be brought to this court upon writ of error, although the proceeding may not be technically one at law, as distinguished from equity. The last motion to dismiss, must, consequently, be denied."

In the case of Childs *vs.* Childs, 49 Md., 509, the court of appeals of Maryland held that English matrimonial cases were subject to the jurisdiction of the ecclesiastical courts, which were governed by the principles of the canon and civil law, which to that extent became a part of the common law, and as such were recognized by the declaration of rights, and by the constitution of Maryland, as a part of the law of the land. Congress by the act of February 27, 1801, made the laws of Maryland the law of this District (2 Stat., 103).

It is further suggested in the brief on behalf of the plain-

tiff in error that section 10 of the act of 1898 was repealed by the District Code before the trial of this case.

The Code was approved March 3, 1901. This case was tried in the spring of 1902. Section 10 of the act of 1898 was not carried into the Code. But section 1638 of the Code provides:

"The repeal by the preceding section of any statute, in whole or in part, shall not affect any act done or any right accruing or accrued or any suit or proceeding had or commenced in any civil cause before such repeal, but all rights and liabilities under the statutes or parts thereof so repealed shall continue and may be enforced in the same manner as if such repeal had not been made: *Provided*, That the provisions of this Code relating to procedure or practice and not affecting the substantial rights of parties shall apply to pending suits or proceedings civil or criminal."

Moreover, as was held in Campbell *vs.* Holt, 115 U. S., 620, after the bar of the statute had taken effect, Congress could not affect the right to the real estate and personal property involved in this proceeding adversely to the caveatees by repealing the statute. As was said by Mr. Justice Miller in delivering the opinion of the court in that case:

"It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law."

Probably it was because of this principle that section 10 was omitted from the Code. The bar of the statute had already operated in all cases so as to vest in the holders the

title to the real and personal property of decedents whose wills had been admitted to probate before the act of June 8, 1898, and no further legislation could affect that title.

II.

ESTOPPEL—THE FACTS.

It is admitted in this case that Charles H. Utermehle received from Sarah Utermehle, as executrix of George W. Utermehle, the sum of $2,116.88 on account of the bequest to him in his grandfather's will of a certain note and the interest thereon; that he took possession under that will of the Young law building and after collecting the rents thereof for about a year sold it for $20,000, claiming and using the rents and the proceeds of the sale as his own; that during the lifetime of Sarah Utermehle he received from her large sums of money, part of the personal estate bequeathed to her by the will of her husband, and that after her death and under her will he received further large sums of money from her executrices, which were also part of the personal estate which Sarah Utermehle had received under her husband's will.

It is also admitted that ordinarily one who takes a benefit under a will cannot controvert it. The questions of estoppel involved in this bill of exceptions grow out of matters set up by Charles H. Utermehle in the paper filed by him on November 3, 1900 (22–28), in reply to the claim of estoppel. In that paper he, in substance, avers:

1. That about May 19, 1900, he learned for the first time "of the true and infirm, mental and physical condition of his grandfather at the time of the supposed execution of said will and just learned also of the undue influence practiced upon the deceased by the said Rose M. Taylor and her husband;" that he then also first learned that Mrs. Taylor and

her husband had practically dictated and controlled the actions and business of George W. Utermehle during the last three years of his life; that during those three years George W. Utermehle was habitually intoxicated (23–24); that for about six years prior to his grandfather's death he had resided in Frederick, Maryland; and that just before and at the time of the death of his grandfather he had been in a poor state of health, and had during the last two or three years of his grandfather's life seen but little of him, "on account of which he had lacked the opportunity to become then acquainted with the habits or mental or physical condition" of his grandfather (23).

2. That immediately after the death of his grandfather he entered into a stipulatien or agreement with Sarah Utermehle and the petitioners, Mrs. Norment and Mrs. Taylor, to the effect that Sarah Utermehle "would by her will arrange matters justly and provide for respondent to receive ultimately as much of the estate of George W. Utermehle as each of the petitioners;" that immediately after the death of Sarah Utermehle he learned that by her will she merely provided for an equal distribution of what property she might die possessed of between the petitioners and himself, and that when she died she was in fact worth only about $200,000 (26); that before he had any opportunity to consult counsel he was taken dangerously ill and "confined to his bed in Frederick, Maryland, in a critical condition for a period of six weeks or more, after which, as a result of such illness, he remained in an impaired physical and mental condition for over two years," during which time his affairs in Washington were attended to by his agent, Charles W. Handy, he himself remaining during said period at his home in Frederick, "unable to transact or enter into business details;" and that when in November, 1899, after many years' residence away, he returned to Washington, he received certain information which placed him upon inquiry, and he then,

about May, 1900, learned "of the true conditions aforesaid and his legal rights in connection therewith" (26–27). In this connection it is also averred that after the death of George W. Utermehle, and before the death of Sarah Utermehle, the caveatees obtained from the latter a large part of her property (28).

3. That he had been "misled and purposely deceived as to his rights or as to what he might expect, by misrepresentations made by the petitioner Rose M. Taylor, in the presence of and acquiesced in by the petitioner, Mamie E. Norment," and that about May 19, 1900, he "discovered the misrepresentation and fraud practiced upon him." In what the misrepresentation or fraud here relied upon consisted the caveator in his answer did not state.

4. That he was ignorant of his "rights" till 1900, when for the first time he was made acquainted with them (23, 24, 26, 27, 28, 29).

In discussing the matter of estoppel in this brief we will first consider the evidence on each of the foregoing propositions, and then take up the law of the case relating to that subject.

1. *As to the evidence in relation to the averment that in* 1900 *the caveator first learned of the alleged unsoundness of mind and habits of intoxication of the testator, and of the alleged undue influence and control of Dr. Taylor and Mrs. Taylor, and the alleged want of opportunity to learn these things at an earlier date.*

The averments of the caveator in his pleadings on this subject are exceedingly general. He states that for about six years prior to his grandfather's death he resided in Frederick, Maryland, and that just before and at the time of the

testator's death, he, the respondent, had been in a poor state of health and had, during the last two or three years of his grandfather's life, seen but little of him, so that he lacked the opportunity to become then acquainted with the habits or mental or physical condition of the deceased (23); that in May, 1900, he had discovered the true and infirm mental and physical condition of his grandfather at the time of the supposed execution of the will, and had then also just learned of the undue influence practiced upon him by Mrs. Taylor and her husband to secure the will; that Dr. and Mrs. Taylor had controlled the testator's actions and business during the last three years of his life, and that during that time the testator was habitually intoxicated (23–24).

His testimony on his direct examination was equally general. In answer to leading questions he testified that from 1889 up to some months after he returned to Washington, which was in 1899, he had no knowledge whatever with reference to the testamentary capacity of his grandfather, or with respect to any undue influence practiced upon his grandfather by Mrs. Taylor or any other person, or as to whether his grandfather was of sound and disposing mind when he made his will, or as to the alleged undue influence, fraud, duress, or coercion (66, 67).

His testimony as to his alleged discoveries just before bringing suit and filing his caveat are in substance that after a conversation between his mother and one Seth A. Terry, he, witness, went to see Terry; that his mother then went to see Mr. Lambert, and Mr. Lambert came up to the house, and that witness and Lambert then went to look over papers in his grandmother's estate in the orphans' court, and the papers in the case of Norment *vs.* Norment, and also in a certain case which involved the $750 note; that he read the papers in the latter case and glanced over those in the case of Norment *vs.* Norment, "and after looking at the facts testified to in the several cases," mailed a letter to Mrs. Norment and a letter to Mrs. Taylor, notifying them that he

denied the validity of the will and that he proposed to contest it (69). He further stated that he continued his search for information and facts, and interviewed many persons "from whom he learned quite a few facts in regard to his grandfather's capacity and in regard to his actions and a good deal about his drinking habits, and also he learned a good deal about his business relations with Dr. Taylor and his wife" (70). Nowhere is it stated what fact he learned, or from whom, in relation either to his grandfather's capacity, his actions, his drinking habits, or his relations with Mrs. Taylor and her husband.

Naomi Utermehle, the mother of the caveator, testified that in the fall of 1899 or early in the year 1900 she saw Mr. Terry, from whom she learned that the testator had asked for the payment of interest monthly on a certain loan on the ground that the money loaned belonged to the witness, and that it had to be paid promptly because it was part of her living. She further testified that she told her son about this; that her son went to see Mr. Terry; that in point of fact the testator did not have any money of hers to lend and did not make any monthly payments to her, and that her son went to see Mr. Terry, and that she saw Mr. Lambert and placed the matter in his hands (50). Terry was called as a witness for the caveator, but was asked nothing on this subject (158).

As to the alleged lack of opportunity on the part of the caveator, prior to 1900, to learn the alleged facts relied upon to defeat the will, the evidence was as follows:

The caveator's mother testified that he was born July 2, 1865 (44); that her husband, the caveator's father, died on January 4, 1867 (45); "that Charley always went to see his grandparents from the time of his father's death to the death of his grandfather and grandmother; * * * that after he got to be of some size he often stayed there all night, and when about eight or nine years old he very often went to see him on Friday or Saturday evening or Saturday morn-

ing and stayed until Sunday" (48). On her cross-examination she testified that during the winter of 1886 and 1887 (which was a few months before the will was executed) her son was with her in Washington a great deal, and that during that time he used to go to see his grandfather right often, possibly once a week; that he would say where he was going and would take his wife and baby with him and go out; that on these visits he would go at lunch time and take lunch and stay till late in the afternoon (51).

Her own relations with the testator and his family were broken off immediately after her husband's death, in 1867, by reason of a controversy and litigation between him and her growing out of the fact that he claimed as his own certain bonds which were in the son's possession at the time of the son's death, which claim she resisted (46–47).

The caveator himself testified to his constant visits to his grandfather's house from the time he was five or six years old until he went to Frederick to live, which was in 1882 or 1883. He said that before he went to Frederick he usually went to see his grandfather once a week, and sometimes oftener; that up to this time his relations with his grandfather were extremely pleasant; that during this period he rode around the city with his grandfather and went with him to the oyster wharf on Saturdays; that he was in the habit of going to his grandfather's on Friday afternoon and on Saturday, and that when he was from ten to fourteen years old he would go to his grandfather's house on Friday and stay until Monday; that he would eat at the table with his grandfather, and after supper they would play dominoes; that on Sundays he would go around the place with his grandfather; that as a rule he would leave Sunday evening at about 4 or 5 o'clock, but would sometimes stay to supper, and sometimes stay all night, and that this continued up to the time he went to Frederick (51–53).

On his cross-examination he testified that this went on

from the time he was about ten years old until he was about sixteen or seventeen (72–73).

The caveator further testified that in 1887 for about five months he was in Washington in the real-estate business, and that he was away from Frederick in the winters (60); that during the five months he was in Washington he was in partnership in the real-estate business here with a man named Newcomb, and that during 1887 he saw his grandfather possibly half a dozen times at his grandfather's house, where he would spend an hour or two, or something of that kind, or possibly take dinner (58). (The will in controversy was executed December 7, 1887).

On his cross-examination on this subject he said that during these five months in 1887 he went over to see his grandfather about half a dozen times; that he did not take meals there—he might have taken a meal there, but he was not positive of it; that on these visits he would stay a couple of hours; that it is likely that during that time he went to see his grandfather on two or three occasions with his wife and took dinner, and would stay around after dinner with the family; that he could not say this occurred on more than two or three occasions from February to June, 1887; and that during this period he went to see his grandfather about getting him to give him some plate-glass insurance, and also had a conversation with his grandfather about selling for him certain real estate in this city (75–110). He said that on the strength of this conversation he put the property in his partner's hands for sale, and that it never occurred to him at that time that his grandfather did not have mind enough to authorize the sale of the piece of property in question (110).

The caveator further admitted that he took Christmas dinner at his grandfather's house in 1887 and again in 1888 (77–78); that in 1888 he saw his grandfather possibly four or five times; that between December, 1888, and April, 1889, he went over to see his grandfather possibly once a

month, and that for two or three days just before his grandfather's death (which occurred April 16, 1889) he went to see him several times a day (59). He further stated that during the latter part of his grandfather's life he saw him on one or two occasions only on the street, and that then somebody was with him (62), and that to his knowledge his grandfather did not attend to any business after the spring of 1887; that in the spring of 1887 he did not seem to be attending to any business (71).

The evidence as to the caveator being in Washington after his grandfather's death and the opportunities he had to learn all about the alleged grounds of assault on the will is referred to below in another connection.

As to the alleged habitual intoxication of the testator and the caveator's opportunities for knowing of it, his mother testified that the testator "always drank; he always drank every morning; he drank early in the morning and he drank two or three times after that a day; that she noticed that he drank, as she supposed, a great deal; * * * that she continued to see a good deal of him down to 1867, when her husband died, and she noticed that he always drank; that he always kept it and always took pretty good drinks, and that whenever she went to the house he always drank" (49).

She further testified that her son would go at lunch time and take lunch with his grandfather and stay until late in the afternoon; "that he knew that his grandfather was always drinking, but she could not remember whether he ever said his grandfather was drunk or not" (51). She testified particularly to meeting Mr. Utermehle in the fall of 1882 in the office of Mr. Eugene Carusi, where there was a good deal of controversy between the parties, Mr. Utermehle taking part. She said at that time his face was very red, but she could not tell whether he was very drunk or very sober.

On this subject the caveator testified that up to May 13,

1883, when he went to Frederick, he noticed that his grandfather kept liquor in a room at the house, and had seen him at times take a drink; that he would go in the store-room at his house and get a drink and ask the witness on many occasions to go with him; that the witness formed an impression as a child that his grandfather was a person who took a drink when he wanted to, and that it was the regular thing in the morning for him to take a drink (57). He further testified that his only knowledge of his grandfather's style of drinking was that he kept this whiskey in this store-room and would go there, and that on every occasion that the witness took a drink with him his grandfather took a very large drink; that he would take a rather thin goblet, fill it possibly half full of whiskey and pour some water with it (61); that his (witness's) first drink of whiskey was taken with his grandfather, on the latter's invitation, some time between 1883 and 1887, and that this was possibly in 1885 or 1886 (110–111).

On his cross-examination the caveator admitted that on the occasions when he saw his grandfather in 1887 he would see him taking a drink, but said he could not say whether he was drunk or sober (76); that on Christmas day of 1887 (which was less than three weeks after the date of the will in controversy), when the witness joined the family in the Christmas dinner at his grandfather's house, he observed that his grandfather seemed to be drinking that day; that he could not say he was so drunk that he could not navigate, but that he was not able to carve the turkey to witness's satisfaction; that the witness himself took two drinks with his grandfather on that day and noticed that his grandfather was drinking more that day than at any other time (76–77). The dinner hour at Mr. Utermehle's house was in the middle of the day. The caveator testified that at the evening meal that day his grandfather did not appear, being apparrently upstairs; that he heard his grandfather come downstairs and some girl or woman went out into the hall and

got him and took him back upstairs; that nobody was upstairs that the witness knew of and he saw his grandfather at the bottom of the stairs in his night clothes; that the latter appeared to be under the influence of liquor that day (58–76–77).

The caveator having stated that his grandfather had his peculiar ways (52), he was asked, on cross-examination, to state what the peculiarities were; whereupon he stated that his grandfather seemed always to be peculiar in this—that when he was talking to any one he would not ask you for your opinion; he would tell you straight his opinion, and he would speak about something in that way; that he drove around and walked around the place; that he could not say that his grandfather was strongly of his own opinion; he simply expressed an opinion of something that he got his idea on; the witness could not say that it was his direct opinion; that as to the peculiarity in walking around his place, the witness had seen his grandfather trim rose bushes in the spring of the year and get his hands bleeding from thorns, which the witness supposed was peculiar, because the average person would put on gloves to cut rose bushes; that this happened on three or four occasions; that another peculiarity was that he sometimes got mad at his colored man for being late, and would get mad and jump into him; that he several times threatened to discharge the colored man, and once did, in fact, discharge him, but the colored man paid no attention to him; that his grandfather swore at the colored man in a combination of German and American, and that his grandfather would scold and swear at the colored man when he was late and the colored man would go on about his work (73). In this connection the witness further testified that he was afraid to ride around with his grandfather, because he did not drive with any care—was liable to run over somebody or somebody was liable to run into him; that he would sit in the vehicle, hold the reins, and let the horse go on one way or the other (61); that this occurred at

intervals from the time the witness was six or ten years old until the summer of 1882; that it was during this period that he discovered his grandfather's tendency to drive fast (72–73).

The caveator further testified that when he saw his grandfather in the spring of 1887 he noticed that the latter was failing in health; that he seemed to lack energy, was trembling, and walked more stooped than witness had seen him in previous years; that at dinner on several occasions at that time witness could not understand conversations between his grandmother and his grandfather because the latter was talking in German and seemed to get very excited; that he seemed to get excited very quickly, and would manifest it by talking about what he saw in the paper; that he would curse in a peculiar way that was his own; that he would get up and walk around and pull his hair, or, rather, his wig, and on one or two occasions pulled his wig off (60); that during the last eighteen months of his grandfather's life, from what the witness saw of him, he thought he was getting feeble; that, as to his physical condition, witness noticed that he was very much weaker and more decrepit, and that, as to his mental condition, when witness spoke to him about the plate-glass insurance, his grandfather replied: "All right, you write those policies and bring them over here," and that at that time his grandfather talked to him in regard to what he was doing in the real-estate business, and that all his grandfather said to him then was: "I have a piece of property over here in the country. If you can sell it, sell it" (61); that when he saw his grandfather on Christmas of 1888 his grandfather took no part in the Christmas dinner, and witness thinks he was in such a feeble condition that he would possibly be lying on the lounge; that he seemed to be in a feeble condition and did not seem to take an active interest in anything that day and did not give any indications one way or the other of being drunk; that between Christmas and April, when

his grandfather died, he saw the latter on two or three occasions and knew that he was in feeble health, and that he, witness, "kept in touch with Washington at all times" (78).

As to the relations between Dr. and Mrs. Taylor, the caveator testified that when he was staying over Sunday with his grandfather they would generally come over on Sunday and take dinner or tea (52); that he knew Mrs. Taylor acted as clerk for her father and looked after his writing (67); that he frequently saw his grandfather's buggy standing in front of Dr. Taylor's house (61); that on the occasion of his visits to his grandfather's house Dr. and Mrs. Taylor almost always talked with his grandfather about business—"some rent, or something about the rent; something about a tenant that had not paid his rent, or something about making repairs on property;" that they "made suggestions to Mr. Utermehle that it would be well to do so and so in the way of repairing or in reference to a loan" (57), and that he had no knowledge as to the conversations between Dr. and Mrs. Taylor and his grandfather except what he overheard between them as to loans (67).

The foregoing is a summary of the evidence offered by the caveator to support the claim made in his pleadings (23, 24) that for about six years before his grandfather's death he, the caveator, had resided in Maryland and had no opportunity to become acquainted with the habits or mental and physical condition of the testator or his relations with the Taylors. Comment would seem to be unnecessary.

2. *The evidence in relation to the alleged contract with Sarah Utermehle and the caveatees, the alleged breach of that agreement, and the excuse made for not taking action for its rescission promptly after the death of Sarah Utermehle.*

The only witness to the alleged agreement between the caveator on one hand and Sarah Utermehle and the cavea-

tees on the other was the caveator himself. He testified that on the day of his grandfather's burial, after the return from the funeral, Mr. William R. Woodward read to the parties in interest, including himself, his grandfather's will; that at Mrs. Taylor's request he went to the house the next day and there met Mrs. Taylor and Mrs. Norment and his grandmother; that Mrs. Taylor did all the talking, his grandmother and Mrs. Norment acquiescing in what Mrs. Taylor said, and that she said "his grandmother was left all the personal property, which amounted to almost, if not quite, equal to what they had received, and that when she died she proposed to make him right—to make him equal with them by equalizing his share; and, further, she wanted to know what the mortgage on his farm was, as she wanted to pay it off" (62–63).

He further testified on his direct examination that between the death of his grandfather and the death of his grandmother he did not do any act to attack his grandfather's will because of this promise made the day after the funeral (66).

On his cross-examination he substantially repeated this statement and added that Mrs. Taylor said "that pap had left his money in that way intending that she (the grandmother) should take care of him;" that the inference witness drew from the conversation was that there was an understanding with his grandfather that witness should be taken care of by his grandmother out of the personal estate; that while Mrs. Taylor might not have used this exact language, that was the natural inference to draw from what she did say (95).

On further cross-examination the caveator was asked whether he agreed to do anything as a consideration for the promise to which he was referring, and he replied:

"It was a promise on their part, and I considered that my action at that time was in the nature of an agreement.

"Q. What do you mean by that?

"A. My action in not making any effort, or in other words, in remaining perfectly quiet and still, making no effort to ascertain anything about the condition of my grandfather's estate, or my rights under it" (97).

Being pressed further on this subject, after stating that there was nothing said at the time about his not attacking the will, the following occurred:

"Q. Was there anything said, in substance, by them or by you that this was an understanding that they would make this promise if you would not attack the will?

"A. There wasn't anything said about my not attacking the will at that time. * * * The conversation was said, and I said, 'Well, that's all right. I will do that.'

"Q. You meant by that that if you would be made whole out of your grandmother's estate when she died, you would accept the situation?

"A. I looked upon that as being an agreement, and I was willing to leave it to it—willing to stand by it" (98).

Further on he admitted that when he went to the office of the register of wills, shortly after the death of his grandfather, and signed the waiver of citation (21), he had entered into this arrangement with his grandmother and his aunts that they would see him made whole when his grandmother died, and he told them that it was all right, and that he didn't intend to make any trouble or opposition, and that it wasn't necessary to induce him to go there and sign that paper, as he had already agreed to let things go (105).

In the paper filed in this case by the caveator on the 3d of November, 1900, in which he sets up his reply to the claim of estoppel, he avers that the personal estate which went to Sarah Utermehle under the will of George W. Utermehle was more than $300,000, "and that she was worth more nearly $600,000 or $700,000" (25). In his testimony he said that he thought that when the promise referred to was made his grandmother had a good deal more than $600,000 or $700,000 of personal property—that in his opin.

ion it should be put she had a million dollars worth of personalty (98–99–80–81).

It was conceded at the trial of this case that the real estate of which George W. Utermehle died possessed was worth about a million dollars (118). Assuming, as the caveator testified, that the personal estate was worth as much, he was worth about two million dollars in all. The caveator's share of this, if there had been no will, would have been $666,666.66. There was, therefore, according to this evidence, ample personal property when the alleged promise was made to have enabled Sarah Utermehle to comply with the alleged promise by making her grandson equal with her daughters as to the whole estate.

The caveator in his pleadings admits that immediately after the death of his grandmother in 1893 he was informed she had died a "comparatively poor woman," and that he was surprised and pained to find that no regard had been made by either his grandmother or his aunts for their alleged pledge or agreement to equalize his share as one of the heirs-at-law of his grandfather (26–27).

In his direct testimony he states the same thing in substance, and says that Mrs. Taylor said to him that there was no use in discussing it, that his grandmother had given to charity, and to this and that, and that he thereupon remarked, "Well, I guess I will have to stand in [it]—this will is a very great surprise to me, and I presume it knocks me out entirely, something I didn't anticipate" (68).

On his cross-examination he again still more explicitly admitted that immediately after the death of his grandmother, by statements made to him by Mrs. Taylor and by hearing his grandmother's will read, he knew that the alleged agreement with him had not been kept and could not be kept (89). Further on he says that he told Mrs. Taylor about this time, "I never made but one mistake in my life, and that was when I held still once before and now I have got to stand still" (101).

The caveator also admits that after his grandfather's death his grandmother "lent" him $20,000 (66). This is one of the advances referred to in Sarah Utermehle's will, and it was charged to him in the settlement of her estate (92). Further testifying, he said that his grandmother on another occasion sent him a check, which might have been for $500 or for $5,000, and which was not charged to him in the settlement of her estate (66). On his cross-examination he referred to this check as one for "$5,000 or $6,000 and something" (93). He admits that with money received from his grandmother, Sarah Utermehle, shortly after his grandfather's death, he paid off a mortgage on his farm in Frederick, Maryland (113), and that he used the $20,000 in buying a hotel at Frederick (93).

In his pleadings the caveator stated that for over two years after the death of his grandmother all matters connected with the management and settlement of his property interests devolving upon him as one of the heirs-at-law or alleged devisees and legatees of Sarah Utermehle were attended to by his agent, Charles W. Handy, a real-estate broker in Washington (27). In his testimony in the case he said that he had come into contact with Mr. Handy from 1889 on, and that Mr. Handy had attended to what little business he had from 1890 on (84).

On May 5, 1893, the caveator executed and delivered to Handy a power of attorney, which in effect authorized Handy to represent him in all his business matters, and which specifically gave Handy full power and authority for the caveator and in his name "to employ and consult counsel learned in the law in all matters and things relating to my real and personal property and estates, and to commence and prosecute any actions in any courts having jurisdiction when in his judgment and discretion it may be advisable so to do, in relation to the matters hereinbefore mentioned" (82).

On his cross-examination, when shown certain papers

which he had signed and as to which he said he had no recollection, he explained this by saying that he executed papers on many occasions for Mr. Handy when Mr. Handy told him to do it (108). He further testified that he did not know whether or not Handy under that power of attorney employed counsel to represent him in the estate of Sarah Utermehle (83). Handy was examined as a witness in the case on behalf of the caveator, but no question was asked him as to this power of attorney or as to anything he had done under it (115).

The caveator further testified that Mr. Eugene Carusi, a well-known member of the bar in Washington, had always been a friend of his, and that in dealings with the executrices of the will of Sarah Utermehle, Mr. Carusi was acting for the witness in a friendly way (84). On June 6, 1893, Mr. Carusi addressed a letter to William R. Woodward, the attorney for Mrs. Taylor and Mrs. Norment, in which he said: "I am authorized by my client, Mr. Charles H. Utermehle, to give notice to you as counsel for the executrices of the late Sarah Utermehle that he insists that all the overdue notes held by him [them] be forthwith converted into money by enforcing the deeds of trust by which they are secured" (85). Mr. Carusi witnessed the signature of Charles H. Utermehle to the waiver of citation when the will of Sarah Utermehle was offered for probate (120).

In consideration of this waiver and in consideration of the consent of Charles H. Utermehle to the probate of the will of Sarah Utermehle, the executrices agreed to charge or receive no commissions as such executrices (122.) This was the result of a claim set up by the caveator that he had a right to be an executor with the executrices (84). He testified that it was finally "arranged all right—that they agreed to serve without commissions;" that this agreement, he thinks, was made with Mr. Carusi and Mr. Handy; that he had a perfect right to be an executor, and that he thinks in view of that Mr. Carusi arranged that matter for him,

"but that was, you might say, a friendly act" (94). "Our proposition," the caveator testified, was "not that they were to serve as executrices without commission, but that I was to be made a co-executor with them—to be put on an equal footing with them" (84). He further stated that he thought, but he was not absolutely certain, that he was informed by Mr. Handy or Mr. Carusi that the executrices had agreed to waive their commissions (85).

Immediately after the death of Sarah Utermehle the caveator was informed by Mrs. Taylor and Mrs. Norment that their mother had expressed some wishes in regard to the disposition of part of her estate which were not contained in her will. He testified that he probably told them that it would be all right; that he thought one of these things was a gift of $500 to Louisa Smith, but he was not positive of it. Indeed, he testifies that at this time, in a conversation "in regard to those little furnitures and things" his grandmother had given, he said to Mrs. Taylor: "You can give it all away, so far as I am concerned. I have got the worst of it, and I have got to stand it" (101). And by a paper which was filed in the court, signed by Mrs. Taylor and Mrs. Norment in person and by the caveator by Charles W. Handy, his attorney-in-fact, the executrices were exempted from further accounting for certain of the personal property of Sarah Utermehle, including a horse and carriage given to a minister in accordance with the expressed wish of Sarah Utermehle; a certain promissory note for $500 given to Louisa Smith, as requested by Sarah Utermehle, and certain wearing apparel, furniture, china, silverware, fixtures, and a horse and buggy (120–121).

In December, 1893, the caveator, to secure the payment of an indebtedness of $12,000, gave a deed of trust on the one-third interest in square 765, in Washington, devised to him by his grandmother, and to secure the payment of an additional sum of $15,000 he gave another deed of trust on the same interest in 1896 (109). Under these deeds of trust,

or one of them, his interest in that property was sold for the sum of $13,500 (69).

The caveator testified that in addition to this he got from his grandmother's estate about $60,000 (69). It was admitted at the trial by counsel for all the parties that the account of the executrices of Sarah Utermehle showed that after the payment of certain small debts and legacies the estate was divided into three parts, and that the caveator and his aunts, as next of kin, each received one-third part thereof, each receiving some $84,256.87, either in money, securities, or property, leaving a small amount for further distribution (122).

The various amounts received by the caveator, either directly from the estate of his grandfather or indirectly through his grandmother, are shown by the evidence in this case to be as follows:

From the Estate of George W. Utermehle.

Legacy (5–65–81)	$2,116.88
Young Law building (66–90)	20,000.00
	$22,116.88

From Sarah Utermehle in Her Lifetime, not Including the $20,000 Loan.

Check, May 9, 1889 (81)	$6,566.66
Check (see testimony of caveator, 65)	5,000.00
Check (see testimony of caveator, 66–93)	5,000.00
	$16,566.66

From the Estate of Sarah Utermehle.

Check, April 25, 1889, to Charles W. Utermehle (86)	$770.9
Check, April 25, 1889, to Charles W. Handy, attorney (86)	229.1
Check, June 16, 1893, to Charles H. Utermehle (87)	5,000.0
July 1, 1893, distributive share of promissory notes and interest (92)	77,864.6
Receipt, November 18, 1893, by Handy (90)	1,300.0
Check, June 29, 1894, to Charles H. Utermehle (88)	60.2
Receipt, November 6, 1894, to Charles W. Handy (87)	3,993.5
Receipt, August 4, 1899, by Handy (87)	1,000.0
One-third interest in square 765 (93)	13,500.0
	$103,718.3

Summary.

From estate of George W. Utermehle	$22,116.8
From Sarah Utermehle during her lifetime	16,566.6
From estate of Sarah Utermehle	103,718.3
Total	$142,401.91

It will be observed that the last of these payments was made on August 4, 1899, about three months before the caveator began to consider the matter of assailing his grandfather's will. The evidence does not disclose that anything further remained to be distributed.

We come next to the consideration of the excuses given by the caveator for taking no action in this matter from the time he acquired full knowledge of the alleged breach of

contract just after the death of his grandmother, in March, 1893, till June, 1900.

In his sworn answer, which was filed in the case on November 3, 1900, after admitting that he was informed immediately after the death of his grandmother that the alleged agreement with him with reference to equalizing him with Mrs. Taylor and Mrs. Norment in his grandfather's estate had not been kept and could not be kept, the caveator said that before he had any opportunity to consult counsel he became dangerously ill and was confined to his bed in Frederick in a critical condition for six weeks or more, after which, as a result of that illness, "he remained in a greatly impaired physical and mental condition for over two years, during which time all matters connected with the management and settlement of his property interests, including those devolving upon him as one of the heirs-at-law or alleged devisees and legatees of Sarah Utermehle, were attended to by his agent, Charles W. Handy, * * * your respondent continuing during said period to be unable to transact or enter into business details, remained at his home in Frederick without being advised of the matters and things aforesaid affecting the validity of the alleged will of George W. Utermehle * * * until November, 1899, when after many years' residence away he returned to the city of Washington" (27).

On his direct examination, after testifying that he learned from the reading of his grandmother's will and from what Mrs. Taylor told him that he was to receive only about one-third of $200,000 from her estate, he said that he was completely knocked out and did not know what to say; that he went back to Frederick a few days after that "and not long after that was taken sick with rheumatism and never came back to Washington to attend to any business in regard to his grandmother's estate, or anything of the kind;" that he executed a power of attorney to Handy to attend to all these matters, who gave receipts for all moneys turned over to

him in the transaction; that he did not then put the matter into a lawyer's hands because he kind of thought he could not get much out of the will of his grandmother, and that his grandfather's will was so far back that he could get nothing; that he was indifferent and lost heart; that his health was bad at the time and he had other troubles and things; that he was sick in bed with rheumatism for possibly five or six weeks and was really for eighteen months after that more or less subject to limping and walking around and having pain, rheumatism, and so on; that he was sick for possibly eighteen months and did not entirely recover from the rheumatism until 1895; that in 1893 he was drinking to some extent, more so than he had been previously; that for a year or more he had financial trouble, as well as trouble in private affairs, and that he was never able to take active charge of his affairs until he took charge of the City Hotel (in Frederick) in 1895 (68–69).

On his cross-examination the caveator said that in April, 1889, when he signed the waiver of citation in the matter of his grandfather's will, he was not feeling very good; that possibly he had taken a couple of drinks that day (105–106); that he went to Frederick ten or fifteen days—he could not say definitely—after his grandmother's death in 1893, being backwards and forwards between Frederick and Washington during that period of ten or fifteen days (83); that in 1893 his wife and children were living at the farm in Frederick, and, he believed, at Atlantic City for a while; that during the same period he was in Washington and at different places; that when he was in Washington he was living at his mother's; *that in July, 1893, he went to Detroit to a reunion of the order of Elks, and also went to Chicago to the World's Fair, and came back by way of New York and Atlantic City and Philadelphia; that this trip lasted ten or fifteen days; that in the last six months in 1893 he was in Philadelphia on several occasions, where he went to buy horses; that during the same period he was at the Rockville fair and, he*

believed, at the Hagerstown fair, and that he went to both fairs, in the horse business, to show horses; that he went to Baltimore on two or three occasions in 1893 on the same business, and that during the six months which followed the death of his grandmother, after he got over the rheumatism, he was attending to the horse business in Philadelphia, Rockville, Hagerstown, and Baltimore. Upon being reminded by cross-examining counsel that this was the time when he said in his replication, as an excuse for not attending to business, that he was sick, the witness replied: "I was sick, so far as attending to business was concerned. I could attend to the horse business all right, because that didn't involve any particular amount of business;" that it does not take a very good business man to deal in horses, and *that during this time his headquarters were in Washington, where he was living with his mother, at 1132 Twelfth street* (104).

Being pressed as to why he had sworn that after his grandmother's death he had had no opportunity to consult counsel because he was stricken dangerously ill, he said:

"I understood at the time that paper was written that that was more a figure of speech than anything else" (103).

It further appeared on the caveator's cross-examination that he dealt a good deal in horses all the time from 1884 or 1885 until 1895; that during this period of about ten years he bought and sold horses; that he was buying and selling horses for profit and not simply to work on his farm; that he was in this business off and on for about ten years, but sometimes would not do anything at it for six or eight months; that he dealt between Washington and Frederick and other places, but generally to a greater extent between here and there; that he had no special place of business; that he was on 8th street for a long while, and then sometimes on 8th street and sometimes on G street; that he would put up at a livery stable when he would come in with some horses; that he would get some horses together and

before he would start them out to Frederick would leave them at a stable; that on the day the citation was served on him at Fagin's place he had been at Fadeley's stable, and that the instructions at Fadeley's stable were that any time he was not there and was not out driving during the daytime, they could find him at Fagin's (93–94).

He further testified that two years or more before he testified he had asked for the power of attorney which he had given Handy in 1883, and that he understood that the paper was virtually out of existence a long time before, after the witness got on his feet and got back here to Washington and got to attending to his own business (83).

In the deed of trust which was executed by the caveator December 29, 1893, it was recited that he was then unmarried (109). His relations with his wife had been terminated by a divorce (112). The divorce suit was pending in December, 1893 (112). He admitted that he was not on the farm where his family lived between the early part of August, 1893, and the end of that year, and was not positive whether he was in Frederick at all during that period (113). How he was really engaged in Washington when he was not attending to his horse business or making excursions over the country may be inferred from his cross-examination as to his relations with a man named William L. Rose (111–113).

Thus the statement of the caveator that for seven years after his grandmother's death, in 1893, he was prevented by illness and absence from Washington from taking steps to assail his grandfather's will or enforcing his alleged contract with his grandmother was shown out of his own mouth to be without the slightest foundation in fact.

3. *The evidence relating to the alleged misrepresentation and fraud.*

In answer to the petition of the caveatees, offering the will of their father for probate as a will of real estate, the caveator

states that he was "misled and purposely deceived as to his rights, or as to what he might expect, by misrepresentation made by the petitioner, Rose M. Taylor, in the presence of and acquiesced in by the petitioner, Mamie E. Norment;" that in May, 1900, he discovered "the misrepresentation and fraud practiced upon him by petitioners" (23), and that his grandmother and the caveatees well knew that the legacy of the $750 note to him was merely an artifice intended to deceive the caveator (25).

No attempt was made to prove the averment of knowledge on the part of the grandmother or of the caveatees, or either of them, of any supposed artifice with reference to the $750 note.

As to the misrepresentation so vaguely charged, the caveator testified on his direct examination that immediately after his grandfather's death, in the presence of and with the acquiescence of his grandmother and Mrs. Norment, Mrs. Taylor told him that the personal property was almost if not quite equal to what they had received (63). On his cross-examination the above-quoted paragraph from his answer was read to him, and he was asked to state what the misrepresentations were that he there referred to. He answered: "Misrepresentation of the fact of the amount of personalty that was left to me, or rather the amount that was left to my grandmother under the will; the fact that she did not carry out the promise that was made to me, * * * so that at her death I would be equalized with the other two" (94). Being pressed further whether this was all, he said: "The substance of what she [Mrs. Taylor] said was that the personal estate that had been left to my grandmother under the will was almost, if not quite, equal to all of the real estate that was left to them," and that the substance of what Mrs. Taylor said was that under an arrangement that had been made between his grandfather and his grandmother he, the witness, was to be taken care of out of the personal estate (95).

The further cross-examination on this subject is too long to be set forth here, but will be found in full on pages 95 to 99 of the printed record.

It will be seen that the caveator was compelled to admit, and did admit, that there was no misrepresentation made to him at all; that so far as he knew and believed, after all the alleged discoveries which he had made, the personal property which his grandmother received was sufficient to have enabled his grandmother to give him an equal share with Mrs. Taylor and Mrs. Norment of the estate of his grandfather. There was no other testimony on the subject. The whole case for the caveator in this connection dwindled to the alleged promise of his grandmother to equalize things at her death. If that promise was ever made it was broken when she died. A promise is not a representation, but a contract (2 Pom. Eq. Jur., 808). The caveator's remedy assuming his story to be true, was by an action against her estate. That action was barred in three years from the date of her death (Abert's Comp. 360). This consideration alone is fatal to the case of the plaintiff in error.

Before entering upon the consideration of the authorities bearing upon the questions of law raised by the evidence hereinabove referred to, it is important to refer to the *changes in the situation of the caveatees and others during the period from 1889 to 1900, when the caveator was taking benefits under the will of his grandfather.*

George W. Utermehle died April 16, 1889 (1), and his will was admitted to probate April 26, 1889 (2). The first intimation of the caveator's intention to dispute the will was his letter to Mrs. Taylor and Mrs. Norment of May 19, 1900 (69), more than eleven years after the caveator had appeared in the probate court and in writing informed the court that he waived citation and consented that the court might act on the petition for probate without further notice to him (21).

In the meantime the widow, who was the principal person interested in sustaining the will, both as executrix and as a party in interest, had died. Mrs. Taylor died before the case could be reached for trial. (Her deposition was taken, but the impossibility of anticipating the evidence of the caveator and his witnesses is obvious.) Of the three witnesses to the will, two had departed this life, and the other had been stricken with paralysis (42). Of course, in the eleven years that elapsed between the death of the testator, in 1889, and the filing of the first caveat, in June, 1900, many persons who knew him had passed away, and the recollection of surviving witnesses had become dim. Mrs. Taylor and Mrs. Norment had allowed their mother, the executrix, to take possession of the entire personal estate, admitted to have consisted of several hundred thousand—possibly a million—dollars, upon a nominal bond which did not require her to account for the same, or even to file an inventory thereof (3). A part of this personal property—how much can never be known—the widow gave away to charity (26). As executrix she filed no inventory or account (118). She simply reported to the court that she had paid all the debts of the deceased which had come to her knowledge and had paid the legacies in full. Among these legacies was $9,000 which had been paid to persons who were not entitled to receive anything unless the will was valid (4). The widow, accepting the personal property, had given up her dower interest not only in the Young law building, but in all the real estate of her husband except square 765. Of that square she had taken possession as owner and her right thereto was acquiesced in by both Mrs. Taylor and Mrs. Norment.

The will required that Mrs. Taylor and Mrs. Norment should divide the real estate (except square 765) between them. If either objected she forfeited her entire interest with the exception of five dollars. Relying upon the will standing and complying with this requirement in July, 889, they made a division between them of the numerous

parcels included in the devise (123–127), except a few parcels which it was found necessary to sell for the purpose of partition (157). Mrs. Taylor prior to April had sold to third persons some of the parcels which went to her in the division to the value of $40,000 (157).

The parcels which went to Mrs. Norment in the division were conveyed by her and her husband to Job Barnard, trustee, in July, 1899, and at the same time the trustee conveyed the same to Samuel Norment (127–128). Mr. Norment died in March, 1891, seized of a large estate, which by his will was devised to trustees upon certain trusts for the benefit of his wife, his children by that wife, and his children by a former wife. In April, 1892, Mrs. Norment filed a bill in equity against the trustees and all the children, two of whom were minors, in which she charged that the property which came to her from her father had been transferred to her husband under an agreement between her and her husband by which she was to have at his death one-third of his entire estate absolutely, and that by his will he had given her only a life interest in one-third of his estate. She sought by the bill to have the court require the trustees to convey back to her the real estate which had been devised to her by her father (128 to 140). The adult defendants filed an answer in which they denied the principal averments upon which the complainant based her prayer for relief (141 to 151). In February, 1895, all the adult parties to the suit entered into a written stipulation of compromise of the matters involved in the litigation, which was, however, subject to the condition that if it should not be approved by the court as to the infant defendants it should be void (153–155). Thereupon a final decree was made in the case ratifying the compromise as to the infant defendants and making the compromise agreement binding upon all the parties (156). The effect of this proceeding was that a part of the real estate which Mrs. Norment had received from her father and had

conveyed to her husband was vested back in her, the title to the remainder of the property being left in the trustees under the will of Samuel Norment for the benefit of the other parties to the cause, including Mrs. Norment's two minor children. Mrs. Norment was deprived in this way of any interest in the real estate of her husband other than that which he had derived from her. It is manifest that if the caveator should now be allowed to reach a one-third interest in the real estate of his grandfather which entered into this compromise, it would be impossible to put Mrs. Norment or any of the other parties to that litigation *in statu quo*. And it should be noted that in the evidence there is not a word reflecting in the slightest degree upon Mrs. Norment. It is indeed said (63) that she was present and giving silent acquiescence when the alleged agreement was made between the caveator and his grandmother (through Mrs. Taylor) about equalizing his share in his grandfather's estate, but there is nowhere anything indicating that she had any knowledge or belief that the alleged promise then made could not be carried out, or that she had anything to do with its not being carried out, and the charges made in the pleadings of undue influence and coercion are directed against Mrs. Taylor and her husband and not in any degree against Mrs. Norment.

Even as to Mrs. Taylor, while it is averred in the pleadings that she exercised undue influence upon her father, and that he was under the control of her and her husband, there was no offer to prove anything specific against her or her husband (159).

It must be remembered, too, that since the death of Sarah Utermehle, in 1893, there has been no representation of the estate of George W. Utermehle. On the assumption that all the parties in interest had accepted the will of her husband, she, as his executrix, wound up his estate by paying all debts and legacies and distributing the entire personal estate. When she died there was apparently no necessity for further administration and none was had. If, now, the will of

George W. Utermehle should be set aside, how would it be possible to have administration *de novo* of his personal estate? Consider the practical impossibility of doing justice to the caveatees alone in such a belated administration. Their grandmother took the entire personal estate under the will, except the $9,000, which she paid to relatives in Germany, and the two thousand and odd dollars paid to the caveator. The latter, as we have seen, testifies that, in his judgment, that personal estate amounted to a million dollars. It may have amounted to twice that sum. The widow was not required to account for it. She is dead and an inquiry into the subject now would be unavailing; and if such an investigation should be made and it should be ascertained that the personal estate amounted to only $700,000 or $1,000.000, how are the caveatees at this late day to get their share of it? It appears, indeed, that each of them received about $84,000 from that source, but this is only a part of what they would be entitled to. The caveator says in his answer to the claim of estoppel that his grandmother's estate was reduced by "bequests made by her to charity" (26). No one can tell now how much of it was disposed of in that way, and if the amount were ascertained the gifts could not be recalled. In short, a new administration now of the estate of George W. Utermehle is impossible. The Court of Appeals, indeed, held that it was an irregularity to permit the contest to go on, so far as the personal estate of the testator was concerned. Whether this is a correct view of the matter may be questioned, but it is a matter of little consequence to the defendants in error, since manifestly if the will were set aside *in toto* it would be impossible for them to recover their share of the personal estate which Sarah Utermehle disposed of to third persons during her life. The three years bar of the statute of limitations would protect the recipients of her bounty.

Moreover, the caveator, instead of bringing suit on his grandmother's death to enforce his alleged contract with her,

actually claimed the right to be one of the executors of her will! And even that claim he waived in consideration of the executrices giving up their claim to commissions on her estate, which would have amounted to from $12,000 to $24,000 (84, 85, 94, 122).

He went further by authorizing the executrices, unsuspicious of any such claim as he now sets up to carry out the wishes of his grandmother, verbally expressed, by giving up a consideruble part of the personal estate to Louisa Smith and others.

In all these several ways the plaintiff in error precluded himself from disturbing the distribution of his grandfather's personal estate. He thereby made it impossible to put Mrs. Taylor and Mrs. Norment *in statu quo*, and so is precluded from assailing his grandfather's will at all.

III.

ESTOPPEL—THE LAW.

The caveator is to be charged not only with what he actually knew in regard to the physical and mental condition of his grandfather and the alleged undue influence, coercion, misrepresentation, and fraud, but with the knowledge he could have acquired by the use of reasonable diligence—especially as to matters concerning which what he did know would have led a man of ordinary prudence to make further inquiry.

We have seen that the caveator was quite intimately associated with the testator down to 1883; that from that time on he visited his grandfather at least several times a year at the latter's house; that from February till June, 1887, he was in business in Washington, and frequently saw his grandfather, taking meals at the latter's house and dealing with him in business matters; that he spent half of Christmas day of 1887 and 1888 at his grandfather's house, receiv-

ing presents from him on both occasions; that these visits continued through January, February, and March, 1889, and occurred several times a day in his grandfather's last days, in April, 1889; that he knew his grandfather's alleged feebleness in 1887, and knew also his alleged eccentricities and constant habit of drinking liquor, sometimes to excess; and that he knew in a general way of the close business relations between Dr. and Mrs. Taylor and his grandfather.

He knew also that he was one of his grandfather's heirs, and that he had a right to contest the will, for in reply to a question from his own counsel he said that the reason he did not attack it at once was because of the alleged promise made by his grandmother the day after her husband's funeral (66). Finally, he knew in March, 1893, that that alleged promise had not been kept, and that the "equalization" which he says he had been led to expect would not be made.

The first question is whether under these circumstances he could remain passive till 1900 and then assail the will of his grandfather on the ground that he had just discovered evidence of unsoundness of mind, undue influence, &c., which was unknown to him before. This question would hardly seem to require much discussion, but we will invite the attention of the court to a few leading authorities on the subject.

One who became a stockholder in a corporation upon a false representation by an agent of the corporation that he would have to pay only 20 per cent. of the face value of the stock for which he subscribed was held bound to pay in full. The court lays stress upon the fact that he had allowed three years to elapse, and says of one in such a situation:

"He certainly is bound to use care and attention to ascertain his position and promptly to make his choice of retaining it with its advantages and responsibilities, or of abandoning it."

Upton, assignee, *vs.* Tribilcock, 91 U. S., 55.

Where the purchaser of mining property sought to be relieved from the purchase on the ground of fraud, the court, speaking of the necessity for prompt action on the part of one who wants to rescind an action on the ground of fraud, says:

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

Grymes *vs.* Sanders, 93 U. S., 55, 62.

"The law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it."

Wollensak *vs.* Reiher, 115 U. S., 99.

When a depositor in a bank failed to seasonably examine his pass book and returned checks, whereby the frauds of his clerk remained undiscovered for several months, it was held that the depositor and not the bank must bear the loss. The clerk raised a number of checks after the depositor had signed them. These checks bore date from September, 1880, to February, 1881. The depositor did not discover the forgeries until early in March, 1881. The case was tried in the United States circuit court for the southern district of New York. That court instructed the jury to find a verdict for the depositor against the bank on the ground that a bank is responsible if it pays forged checks of its depositors. But this court reversed the judgment, and held that the depositor was estopped to set up the forgeries, the court saying, by Mr. Justice Harlan:

"The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. In the considera-

tion of the question before us aid will be derived from an examination of some of the cases in which it has been defined and applied. In Morgan *vs.* Railroad Company, 96 U. S., 716, 720, it was held that a party may not deny a state of things which by his culpable silence or misrepresentations he has led another to believe existed, if the latter has acted upon that belief. 'The doctrine,' the court said, 'always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.' In Continental Bank *vs.* Bank of the Commonwealth, 50 N. Y., 575, 583, it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. 'Indeed,' said Folger, J., 'it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped. And it has long been held that where there is a breach of good faith to allow the truth to be shown, there an admission will estop. Gaylord *v.* Van Loan, 15 Wend., 308.' The general doctrine, with proper limitations, was well expressed in Freeman *v.* Cooke, 2 Exch., 654, 663, and in Carr *v.* London & Northwestern Railway Co., L. R., 10 C. P., 307. In the first of those cases it was said by Parke, B., for the whole court, that 'if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect.' And in the other case, Brett, J., speaking for the court, said: 'If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state

of facts referred to did not exist.' See also Manufacturers' & Traders' Bank *v.* Hazard, 30 N. Y., 226, 229; Blair *v.* Wait, 69 N. Y., 113, 116; McKenzie *v.* British Linen Co., 6 App. Cas., 82, 101; Miles *v.* McIlwraith, 8 App. Cas., 120, 133; Cornish *v.* Abington, 4 H. & N., 549, 556."

* * * "These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that, where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth—which he has the means, by ordinary diligence, of ascertaining—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct. This principle commends itself to our judgment as both just and beneficent; for, as observed by the supreme court of Ohio in Ellis & Morton *v.* Ohio Life Ins. & Trust Co., 4 Ohio St., 628, 667, while in the forum of conscience there may be a wide difference between intentional injuries and those arising from negligence, yet no man conducts himself 'quite as absolutely in this world as though he was the only man in it; and the very existence of society depends upon compelling every one to pay a proper regard to the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of its rules and remedies to the enforcement of this duty. In almost every department of active life rights are in this manner daily lost and acquired, and we know of no reason for making the commercial classes an exception."

Leather Manufacturers' Bank *vs.* Morgan, 117 U. S., 96, 108, 112, 122.

"The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands not only that he shall have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

Foster *vs.* Mansfield, &c., R. Co., 146 U. S., 88–102.

When laches is in issue the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry.

Johnston *vs.* Standard Mining Co., 148 U. S., 360.
Johnson *vs.* West India Transit Co., 156 U. S., 618.

When a party desires to rescind a contract under which he has received property on the ground of mistake or fraud, he must, upon discovering all the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection. The court cites and reaffirms the extract from Grymes *vs.* Sanders, hereinabove set forth, in connection with that case.

McLean *vs.* Clapp, 141 U. S., 429.

Silence alone of the adverse party will not excuse the plaintiff's laches.

Wood *vs.* Carpenter, 101 U. S., 135–143.
Felix *vs.* Patrick, 145 U. S., 317, 331.

2. *Under the circumstances of this case the mere lapse of time has raised an insurmountable obstacle to an attack by the caveator upon his grandfather's will.*

Attention has already been called to the great injustice that will be done the caveatees if at this late day it should be adjudged that their father died intestate (*ante*, p. —). It has not been charged, nor was any evidence offered to prove, that the caveatees or either of them used any means to prevent the caveator from ascertaining the facts surrounding the execution of their father's will or his mental condition at that time. We think no case can be found where in such a situation an heir has been permitted to lie by for ten or

eleven years and then bestir himself and assail the will of his ancestor. The cases to the contrary are numerous and convincing.

"In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence."

Hammond *vs.* Hopkins, 143 U. S., 224–274.

On the same subject this court said in Galliher *vs.* Cadwell, 145 U. S., 368, 372, 376:

"The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them.

"A reference to a few of the cases in our own reports may not be out of place. In Harwood *v.* Railroad Co., 17 Wall., 78, a delay of five years on the part of stockholders in a railroad company in bringing suit to set aside judicial proceedings, regular on their face, under which the railroad company was sold, was held inexcusable. In Twin-Lick Oil Company *v.* Marbury, 91 U. S., 587, a director of a corporation who had loaned money to it and subsequently bought its property at a fair public sale by a trustee was protected in his title as against the corporation, suing four years thereafter to hold him as trustee of the property for its benefit, it appearing that in the meantime the property purchased had increased rapidly in value. In Brown *v.* County of Buena Vista, 95 U. S., 157, a county was held barred by its laches from maintaining at the end of seven years a suit to set aside a judgment fraudulently obtained against it; and that, too, though it

did not affirmatively appear that the supervisors of the county had knowledge of the existence of the judgment till about twenty months before the commencement of the suit. In Haywood *v.* National Bank, 96 U. S., 611, a party who had borrowed money of a bank and deposited with it as collateral security certain mining stocks, which were sold by the bank upon his failure to repay the loan, was held barred by his laches in a bill to redeem, filed four years thereafter, the stocks in the meantime having greatly increased in value. In Holgate *v.* Eaton, 116 U. S., 33, a married woman who, on being informed of a contract made by her husband for the sale of an equitable interest in real estate held by her in her own right, repudiated it and refused for two years to perform it, was not permitted thereafter to maintain a bill for specific performance of the contract, the value of the property having depreciated. In Davison *v.* Davis, 125 U. S., 90, a bill to compel the specific performance of a contract to sell personal property upon the payment of a promissory note, payable at a date after the making of the contract, was dismissed on the ground of the laches of the complainant in waiting five years after the maturity of the note before filing his bill, the property in the meanwhile having increased in value. In Societe Fonciere *v.* Milliken, 135 U. S., 304, a delay of two years in the commencement of proceedings to set aside a judgment for usury was adjudged fatal, the amount of the usury being small, and the judgment having been enforced in the meantime by the sale of real estate."

In Simmons *vs.* Burlington, &c., R. Co., 159 U. S., 291, the following passage from 2 Pomeroy's Eq. Jur., sec. 965, is quoted with approval:

"When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally im-

peachable, becomes unimpeachable in equity. Even where there has been no act nor language properly amounting to an acquiescence, a mere delay, a mere suffering time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances."

In Fulton *vs.* Moore, 25 Pa. St., 468, a legatee had accepted a bequest of $500 and of some other personal property of small value. She took what was given her by the will and subsequently sued in ejectment to recover her share of the land, which by the same will was devised to others.

Lewis, J., in delivering a concurring opinion, said:

"But there are other objections to the plaintiff's recovery. Ephraim, in his will, claims the place as his own; alleges that he has 'paid out of his own earnings and industry the shares devised to the other heirs of his father in his will,' and gives it, with the residue of his personal estate, to his mother and sister Eliza Lynn. Among the legacies directed to be paid out of the personal estate, is one to Dorcas, the female plaintiff. Her receipt of that legacy, in 1837, was an election to stand by the provisions of her brother's will. She could not take a benefit under the will, and, at the same time, repudiate its provisions. It matters not that the legacy to Dorcas was small in amount. If so, or if it was received by mistake, a chancellor would, perhaps, permit her, within a reasonable time, to refund it; but after the rights of *bona fide* purchasers for value have vested, and after fourteen years' delay and acquiescence, no such relief could be granted without doing injustice. She is therefore barred by her own election."

In Bradfords *vs.* Kents, 43 Pa. St., 474–483, in which the opinion of the supreme court of Pennsylvania was delivered by Judge Strong, afterwards a member of this court, the facts were that a widow had occupied real estate under the will of her husband which devised the land to her during her widowhood. She had also selected certain articles of personal property under the will and disposed of them. She finally

remarried and seventeen years after her husband's death brought suit to recover her dower in other lands. It was held that she was estopped.:

"But a widow who after having become acquainted with all that is necessary for her to know in order to make a binding election receives the gift conferred by her husband's will and uses it as her own, is not at liberty to say she did not intelligently relinquish dower. * * * I know of no case in which it has been held that a lapse of time of more than five years after acts done which are usually treated as indicating an election will not be binding upon a widow and prevent her denial of the election, though the acts were done in ignorance of her rights. Here are seventeen years without ignorance. It would be inequitable for her now to disturb these devisees in remainder or those claiming under them."

Where a will gave a life estate only to the widow and she took possession and also received certain personal property which was bequeathed to her and held possession for *one year*, when she died, it was held that although she had not made a formal election under the statutes of Ohio her representatives were barred from claiming absolutely the widow's share of the personal property (Baxter *vs.* Bowyer, 19 Ohio St., 490).

A widow was held bound by occupation for *ten years* of land devised to her for life and by her declarations that she was to have it for life (Wilson *vs.* Wilson, 145 Ind., 662).

Possession under a will for *thirteen years* was held to estop a daughter from setting up a claim adverse to the will (Drake *vs.* Wild, 70 Vt., 52).

Where a will gave a wife of the testator the income of all his real estate for ten years, and some personal property, it was held that possession by her for *nine years* before making any claim to dower estopped her to deny an election to take under the will (Hovey *vs.* Hovey, 61 N. H., 599).

Where a widow took possession under her husband's will and held it for *thirteen months* and then died, and her repre-

sentatives claimed that she died before she had been called upon to elect between the provisions of the will and her rights under the law; but it was held that her possession for that length of time of itself precluded her, and therefore would preclude her representatives, from setting up a claim adverse to the will (*In re* Well's Estate, 63 Vt., 116, 119).

These cases show that even where the other party is not shown to have changed his position injury to him is presumed. When, as here, the impossibility of putting the other parties *in statu quo* affirmatively appears, the estoppel is complete without regard to lapse of time. The statute of limitations has nothing to do with the case.

3. *This case is governed by the law relating to equitable estoppel, not by the practice or procedure of courts of equity relating to "election;" and ignorance of the law of equitable estoppel is no excuse.*

We will not weary the court with citations from the numerous authorities holding that one who takes a benefit under a will is precluded from assailing the instrument as invalid. That general doctrine was not disputed below, and probably will not be questioned here. Leading cases on the subject are Herbert *vs.* Wren, 7 Cranch, 370; Fisher *vs.* Boyce, 81 Md., 46, 52; Hyde *vs.* Baldwin, 17 Pick., 308; Smith *vs.* Smith, 14 Gray, 532; Fry *vs.* Morrison, 159 Ill., 244; Drake *vs.* Wild, 70 Vt., 52; Williams *vs.* Whittell, 69 App. Div. (N. Y.), 340, 348; Branson *vs.* Watkins, 96 Ga., 54; Van Duyne *vs.* Van Duyne, 14 N. J. Eq., 49.

In Madison *vs.* Larmon, 170 Ill., 65–82—a case which is referred to by opposing counsel as one of the few cases in the books in which the question involved here arises as in the case at bar, not between heir and the executor, but between heirs—the court says:

"This bill is brought by complainants, as heirs-at-law, attacking the will as invalid and praying that it be so de-

clared. The complainants are Kate Stark and her husband, and Katie Kirby (*née* Madison) and her husband, and Arvilla Madison. The bill cannot be maintained by Katie Kirby and her husband and Arvilla Madison, because they are beneficiaries named in the will and have taken their share of the rents. They cannot take under the will as devisees and then contest it as heirs-at-law."

In such cases the amount received under the will compared with what the party estopped would have received otherwise is unimportant (Cunningham's Estate, 137 Pa. St., 621; Lee *vs.* Tower, 124 N. Y., 370).

Nor shall we spend much space or time on the law relating to equitable estoppel in general. That principle is too well established at this day to require extended discussion. It is just as applicable in a court of law as in a court of equity (Dickerson *vs.* Colgrove, 100 U. S., 578; Kirk *vs.* Hamilton, 102 U. S., 68). It is applied even to a case where a party sets up the unconstitutionality of an act of the legislature under which he has derived a benefit (Ferguson *vs.* Landram, 5 Bush., 230; Van Hook *vs.* Whitlock, 26 Wend., 42; Daniels *vs.* Tearney, 102 U. S., 415, 421). It prevents a debtor from assailing a void judgment obtained against him when in another proceeding he has had his creditor excluded because of the judgment (Davis *vs.* Wakelee, 156 U. S., 680, 691). Even the rules of evidence will be suspended as against one who in another controversy has escaped liability by misstating them (Mexican National Railroad Company *vs.* Davidson, 157 U. S., 201; Michels *vs.* Olmstead, 157 U. S., 198).

Mr. Justice Barnard in the opinion which he filed in the case called attention to the fact that counsel in discussing the question of their right to go into the facts as to the execution of the will assumed that it was obtained by fraud. The same remark is applicable to their brief here. They cite here, however, in support of this startling method of reasoning, Neblett *vs.* Macfarland, 92 U. S., 101. It will be

seen that in that case the appellant made no question that he had got the appellee's land by fraud, in consideration of the surrender of a worthless bond. His whole contention was that the appellee should put him in a better position than he was before by paying him the money represented by the bond instead of returning the bond itself. The court was therefore dealing with a case in which fraud was admitted. Here it is denied. The court in this case cannot assume that this will was obtained by fraud. The question here is whether inquiry as to that fact can be made at all.

An intention to deceive any particular person is not necessary. It is not even essential that there should be any intention to deceive anybody.

In his work on Equity Jurisprudence, Pomeroy, in a note to section 802, vol. II, quotes and approves a passage on this subject from the case of Horn *vs.* Cole, 51 N. H., 287. In part the passage is as follows:

"The doctrine having been borrowed from equity, courts of law that have adopted it should obviously look to the practice in equity for their guide in the application of it, and in equity the doctrine had been liberally applied to suppress fraud and enforce honesty and fair dealing, without any attempt to confine the doctrine within the limits of a strict definition. For instance, *the doctrine has not in equity been limited to cases where there was an actual intention to deceive.* The cases are numerous where the party, who was estopped by his declarations or his conduct to set up his legal title, was ignorant of it at the time, and of course could have had no actual intention to deceive by concealing his title. Yet if the circumstances were such *that he ought to have informed himself,* it has been held to be contrary to equity and good conscience to set up his title, though he was in fact ignorant of it when he made the representations. *Nor is it necessary in equity that the intention should be to deceive any particular individual or individuals.* If the representations are such, and made in such circumstances, that all persons interested in the subject have the right to rely on them as true, their truth cannot be denied by the party that has made them against any one who has trusted to

them and acted on them. * * * Though I do not find that the precise point taken here for the plaintiff has been directly decided in any of our cases, yet the general current of our decisions on the subject tends to a liberal application of the doctrine for the suppression of fraud and dishonesty, and the promotion of justice and fair dealing. No disposition has been shown in the courts of this State to treat this equitable estoppel as odious, and embarrass its application by attempts to confine it within the limits of a narrow technical definition."

That an intention to deceive is unnecessary is expressly held also in Leather Manufacturers' Bank *vs.* Morgan, 117 U. S., 96, 112, 122, and in O'Donnell *vs.* Clinton, 145 Mass., 462. It is laid down as the law in 11 Am. & Eng. Enc., 2d ed., 431. In a note to the paragraph to be found there on this subject cases are cited in Alabama, Connecticut, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, New Hampshire, Maine, New Jersey, New York, Pennsylvania, and Texas.

Counsel for the appellant rely upon cases relating to the practice and procedure in courts of equity relating to the doctrine of *election* as applied by those courts in will cases; but, as was clearly pointed out by Mr. Justice Barnard in this case, this doctrine has no application here at all (168).

" Election in equity is a choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property already his own which is attempted to be disposed of in favor of a third party by virtue of the same instrument. More comprehensively, election is defined as the choosing between two rights by a person who derives one of them under an instrument and in which a clear intention appears that he should not enjoy both " (11 Am. & Eng. Ency. (2 ed.), 59).

The Court of Appeals on this point reached the same conclusion, holding that this case is " not one of election, but of estoppel " (190).

The definition of equitable election given by Pomeroy in his Equity Jurisprudence is substantially the same as that given in the encyclopedia (1 Pom. Eq. Jur., sec. 395).

In Rawle's Revision of Bouvier's Law Dictionary, under the title Election of Rights or Remedies, it is said under the head of "In equity" that equitable election is "a choice which a party is compelled to make between the acceptance of a benefit under a written instrument and the retention of some property already his own which is attempted to be disposed of in favor of a third party by virtue of the same paper."

The same distinction was clearly made in a recent case in Tennessee (Parker *vs.* Ramsey, 76 S. W. Rep., 812, decided in 1904).

This distinction between *mere* election and equitable estoppel is often lost sight of for the reason that in many cases the one becomes merged in the other. When a widow who has the right to choose between her dower and her husband's devise, or a land-owner who must let his land go to others if he accepts a benefit under a will so disposing of it, elects to take under the will, the rights of others are not necessarily immediately affected. If the widow or the land-owner, having taken a legacy from the executor in ignorance of the right to elect or in ignorance of facts which would lead to a different course, and, upon becoming informed of the law or of facts previously unknown, seeks to avoid the effect of taking the legacy, a court of equity might look upon the application with an indulgent eye. But if relying upon the implied assertion of the validity of the will by the receipt of the legacy, the executor or some other party in interest has changed his position so that he cannot be put *in statu quo*, then the doctrine of equitable estoppel may be invoked for his protection. This is stated very clearly in a case much relied upon by adverse counsel—Watson *vs.* Watson, 128 Mass., 152. It is there said that "an

election made in ignorance of material facts is, of course, not binding *when no other person's rights have been affected thereby.*"

The only other case which adverse counsel cite as holding that knowledge of the law as to election is essential to a valid election is Spread *vs.* Morgan, 11 H. L., 587. In that case the question was whether the complainant was estopped to claim under a certain will when he had claimed under a family settlement which could not stand with the will. Each of the judges who delivered opinions in the case expressly stated that the complainant had been in possession of the land which he took under the settlement, and also had been in possession of the land which he took under the will, and that he had claimed to be the owner of both. Manifestly, in that case there was, therefore, neither estoppel nor election. One who holds and claims to own both of two things cannot be said to have made a choice between them.

These two cases in 128 Mass. and 11 H. of L. are very fully considered in the opinion of the Court of Appeals in this case (187).

In the case at bar, in the strict sense there is no question of "election." The caveator was simply called upon to decide when his grandfather died whether he would assail his grandfather's will. The only "election" he was then called upon to make when his grandmother died was whether he would attempt to enforce the alleged contract with her in regard to equalizing him with his aunts in the distribution of his grandfather's estate if he would remain quiet. The situation is governed by the same rules which apply to any case when a party has a right to take proceedings in court to enforce supposed rights and fails to do so.

A closer analogy than the equitable rule as to "election" is found in the case of a vendor who, on discovering that he has been defrauded, may disaffirm the sale and bring replevin or ejectment to get back his property, or may affirm the sale by seeking to recover its value. In such a case a decision once made and acted on is binding, whether the

other party has changed his position or not. (On this general subject see Robb *vs.* Vos, 155 U. S., 13, 43; Thompson *vs.* Howard, 31 Mich., 309, 312.)

The Court of Appeals of this District has held that one who had made an ineffectual attempt to collect the value of a piano by application to the probate court could not thereafter bring replevin to recover the piano itself (Smith *vs.* Gilmore, 7 App. Cas. D. C., 192).

A vendor in this class of cases elects whether he will enforce a contract or rescind it. This was precisely what this caveator would have been called upon to do in March, 1893, if the contract alleged to have been made with his grandmother in April, 1889, had been obtained by fraud or misrepresentation, as alleged by him in his pleadings in this case. As has been seen, there was no evidence of fraud or misrepresentation. The grandmother, on the caveator's own showing, simply made a promise which she did not keep. If he had elected to sue her estate for the alleged breach of contract he would have had to sue within three years from her death or be barred by the statute of limitations; but if relying on the alleged fraud or misrepresentation he had elected to rescind, he would have been required to act at once. There was no case for the application of the doctrine held by one or two courts that knowledge of the legal effect of an election is necessary to make the election binding.

But, assuming that the caveator's alleged ignorance of law is properly raised in the case, we proceed to inquire what is the rule in this jurisdiction as to relief from mistakes of law. Before considering the authorities it will be well to see precisely what the record discloses on this point.

In his response in his pleadings to the claim of estoppel the caveator in ten separate places refers to his "ignorance of his rights," or to his alleged discovery of his "rights" in 1900 (22 to 29). Nowhere has he undertaken to define what are the rights to which he refers.

In his testimony by necessary implication he admitted that he knew he was entitled to share in the estates of his grandfather and grandmother. He expressly said that he did not attack his grandfather's will when it was first offered for probate because he relied on the alleged promise made through Mrs. Taylor the day after the funeral (66).

So, he says, he told Mrs. Taylor just after his grandmother's death that he had held still once before and now he had got to stand still (101).

Handy, the agent and attorney-in-fact of the caveator, was on the stand as a witness for the caveator, but no attempt was made to show any ignorance on his part of law or fact (115). Mr. Carusi was not examined at all, and as he acted as the attorney for the caveator in the settling up of Mrs. Utermehle's estate (84, 85, 120) his knowledge was his client's knowledge.

However, the trial judge permitted the caveator to testify as to his knowledge of law, reserving the question of the competency of the evidence (66). He thereupon said that from 1889 till 1899 he had no knowledge with respect to his "rights" in the matter, and that he did not know that the law would prevent him if he took a benefit under a will from disputing it in any way (66). At the conclusion of the evidence bearing upon the question of estoppel the court held that his alleged ignorance, if it existed, did not relieve the caveator from the effect of his acts creating an estoppel (167, 168).

The situation then is this: The caveator testified that he did not know that he could claim property under an instrument, and at the same time have the instrument held to be wholly invalid. Did this, if the jury believed him, relieve him from the equitable estoppel growing out of his acts in affirmance of the will?

The importance of this question which it is not easy to overestimate, and the earnestness with which counsel press the point, requires a careful examination of the authorities.

In Hunt *vs.* Rousmanier, 8 Wheaton, 215, parties who intended to give for a loan security upon a vessel, by mistake and under the advice of counsel, put the security in the form of a power of attorney from the owner to the creditor, authorizing the latter to make a bill of sale of the vessel. The owner having died, and this operating as a revocation of the power of attorney, the creditor being left without any security, filed a bill in equity for relief. The court by Chief Justice Marshall overruled a demurrer to the bill and sent the case back to the lower court for further proceedings. It is said in the opinion that there was no case cited holding directly that a mistake of law could or could not be relieved against. After the case had been so remanded to the circuit court the defendants withdrew their demurrer and filed an answer and the case went to hearing on the pleadings and evidence. The circuit court dismissed the bill and it was brought to this court a second time on an appeal by the complainant. This court affirmed the decree, and held that whatever exceptions there may be to the rule that no relief can be given for a mistake arising from any ignorance of law, the exceptions are few in number and will be found to have something peculiar in their character. Mr. Justice Washington, in delivering the opinion of the court, said:

"Where the parties, upon deliberation and advice, reject one species of security and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension and insufficiency of such security, in consequence of a subsequent event not foreseen, perhaps, or thought of, direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument which was finally agreed upon."

Hunt *vs.* Rousmanier, 1 Pet., 1.

A Kentucky statute gave the holder of a bill of exchange 10 per cent. damages for non-payment in certain cases. In

a case to which the statute did not apply, but to which all the parties thought it did apply, a note was given to a bank which included $1,000 damages on a prior protested bill for $10,000. It was held by this court that the parties who signed the note were liable on it and could not be relieved on account of their mistake of law. In the opinion it is said:

"The main question on which relief was sought by the bill; that on which the decree below proceeded, and on which the appellees rely in this court for its affirmance; is, Can a court of chancery relieve against a mistake at law? In its examination, we will take it for granted, the parties who took up the bill for $10,000 included the damages of $1,000 in the $8,000 note, and did so, believing the statute of Kentucky secured the penalty to the bank; and that, in the construction of the statute, the appellees were mistaken. Vexed as the question formerly was, and delicate as it now is, from the confusion in which numerous and conflicting decisions have involved it; no discussion of cases can be gone into without hazarding the introduction of exceptions that will be likely to sap the direct principle we intend to apply; indeed, the remedial power, claimed by courts of chancery to relieve against mistakes of law, is a doctrine rather grounded upon exceptions than upon established rules. To this course of adjudication we are unwilling to yield. That mere mistakes of law are not remedial is well established; as was declared by this court in Hunt *v.* Rousmanier, 1 Pet., 15; and we can only repeat what was there said: 'That whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character,' and to involve other elements of decision."

Bank of United States *vs.* Daniel, 12 Peters, 32–55–56–58.

In 3d Rose's Notes on United States Reports, beginning at page 702, in a note to the above case, the following occurs:

"Cited, affirmed and principle followed in Upton *v.* Tribilcock, 91 U. S., 50, 23 L., 206, where party sought re-

lief from liability on stock, on grounds of misrepresentation by broker and mistake of law; *In re* Dunham, 8 Fed. Cas., 39, refusing relief from mistake purely of law; Allen *v.* Galloway, 30 Fed., 467, where court refused to set aside a settlement made under mistake, there being no evidence of misrepresentation or fraud; Hamblin *v.* Bishop, 41 Fed., 82, where conveyance was made under mistake; Gwynn *v.* Hamilton, 29 Ala., 239, where husband, under mistake of his marital rights, delivered personal property of his wife to her distributees; Rector *v.* Collins, 46 Ark., 178; 55 Am. Rep., 574, where parties supposed law would imply interest after maturity at same rate as fixed in note; Boggs *v.* Hargrave, 16 Cal., 565; 76 Am. Dec., 565, action at law, where purchaser at foreclosure sale made mistake as to effect of decree; Bond *v.* Coats, 16 Ind., 203, where promise to pay, made under mistake as to liability, was enforced; Oiler *v.* Gard, 23 Ind., 219, and there can be no presumption of fraud where parties entered into contract with full knowledge of facts; Pierson *v.* Armstrong, 1 Iowa, 291; 63 Am. Dec., 447, where father granted property to his married daughter with intention same should never pass to her husband; Stover *v.* Poole, 67 Me., 223, where deed and bill of sale was executed under mistake; Sandlin *v.* Ward, 94 N. C., 495, where covenant was made under mistake as to its legal effect; Arnold *v.* Donaldson, 46 Ohio St., 81; 18 N. E., 544, where lands were purchased under advice of counsel that title was clear, and dower was subsequently assigned in same; Good *v.* Herr, 7 Watts & S., 256; 42 Am. Dec., 237, where there were mutual mistakes as to who were heirs-at-law of an intestate; Desert Bank *v.* Dinwoodey, 53 Pac., 220; 17 Utah, 60, where mistake was made with full knowledge of facts; McDaniels *v.* Bank, 29 Vt., 240; 70 Am. Dec., 413, mistake made under advice of counsel; Zollman *v.* Moore, 21 Gratt., 323, where estate had been distributed in accordance with petition, but petition had been drawn under mistake as to legal rights of petitioner; Harner *v.* Price, 17 W. Va., 542, where party through ignorance of law confessed judgment when he might have plead statute of limitations; Cooley *v.* County of Calaveras, 121 Cal., 485; 53 Pac., 1076, where the understanding of law at date of settlement of a claim was held conclusive."

In Wheeler *vs.* Smith, 9 How., 55–82–83, an heir-at-law in consideration of a sum of money gave a release to the executors of his uncle's will in ignorance of the fact that a charitable devise in the will was invalid, and was relieved on that ground. One of the executors, who was a distinguished lawyer of high standing, had advised the heir that the devise was good. The court said:

"But in making the compromise, the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors. Having the confidence expressed in the validity of the devise, they could hardly have felt themselves authorized to pay to the complainant $25,000 for the relinquishment of a pretended right. Nor could they have deemed it necessary, in the agreement of compromise, substantially to constitute him the donor of the munificent bequest to the town and trade of Alexandria."

In U. S. *vs.* Hodson, 10 Wall., 395, under a statute which required distillers to give a bond conditioned for their complying with some of the provisions of the internal-revenue laws, a bond was taken which required compliance with all the provisions of law on the subject. The bond was held binding on the sureties as to everything covered by its terms. At the conclusion of the opinion the court says:

"But we prefer to place our judgment upon the broader ground marked out by the adjudications of this court, to which we have referred. Every one is presumed to know the law. Ignorance standing alone can never be the basis of a legal right. If a bond is liable to the objection taken in this case and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into and the principal enjoys the benefits which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hard-

ship in holding that the contract as made is the measure of the rights of the Government and of the liability of the obligors."

In Railroad Co. *vs.* Soutter, 13 Wall., 517–524, the bondholders under a second mortgage on a railroad bought in the road, subject to an earlier mortgage, and formed a new corporation to operate the railroad. Certain creditors filed a bill to set aside the sale as fraudulent as against them. While that suit was pending the bondholders under the first mortgage obtained a foreclosure. The new corporation thereupon paid off the bonds secured by the first mortgage. The creditors having finally secured a decree setting aside the sale under the second mortgage, the new corporation sought to recover back the money paid to the original company. It was held that they could not recover, because the mistake they had made was one of law and not of fact.

In Upton, assignee, *vs.* Tribilcock, 91 U. S., 45–50, one who had subscribed to stock in a corporation upon representations, which he relied upon, that he would have to pay less than the face of the stock was held liable in full on the ground that a misstatement of the law will not avoid a contract; and the court cites Hunt *vs.* Rousmanier, 8 Wheaton, 174, in support of that proposition.

In Lamborn *vs.* County Commissioners, 97 U. S., 181–185, it was held that taxes paid under an erroneous impression that they were valid could not be recovered, although the law under which they were collected was invalid, because the party paying the taxes had merely made a mistake of law. The court again cites Hunt *vs.* Rousmanier, *supra*, in support of this doctrine.

In Snell *vs.* Insurance Company, 98 U. S., 85–92, an insurance policy on cotton was issued to one of several joint owners upon the assurance of the agent of the insurance company that a policy in that form would protect the interests of all the joint owners. A bill to reform the contract in ac-

cordance with this understanding of the parties was sustained, stress being laid by the court on the fact that it was the action of the company's agent that caused the insured to believe that a policy taken out in his own name would protect his associates as well. In delivering the opinion of the court Mr. Justice Harlan refers to Hunt *vs.* Rousmanier as holding that a mistake of law may be corrected, but he says further on that the court in the case before it did not depart from the salutary rule that "a mere mistake of law stripped of all other circumstances constitutes no ground for the reformation of written contracts." He adds that in such cases the party aggrieved must act promptly, and that the evidence must be of the clearest and most satisfactory character.

In United States *vs.* Ames, 99 U. S., 35, the United States in a proceeding in admiralty had taken a bond in lieu of the vessel in controversy. One member of a firm signed the bond in his individual name as surety. The United States, being unable to satisfy its claim against the parties to the bond, filed a bill against the representatives of another member of the firm seeking to have his estate held on the ground that the bond was given under the direction of the firm and for its benefit, and that the firm got the vessel, the contention being substantially that a mistake had been made in having the individual partner sign his own name instead of that of the firm, all parties supposing the firm to be bound.

The court said:

"Concede that, and still the complainants aver that they did not know, when they obtained their decree against the claimant and his sureties, that the property belonged to the partnership, or that the bond for value was in fact given by the claimant pursuant to the direction of the other partners.

"Averments in a bill of complaint that the parties to a judicial proceeding understood that the legal effect would be different from what it really is, amounts merely to an

averment of a mistake of law against which there can be no relief in a court of equity (Hunt *v.* Rousmanier's Administrators, 1 Pet., 1)."

In Laver *vs.* Dennett, 109 U. S., 90, where a license had been granted for the use of a patented invention in a certain district, the parties intending—but not expressly providing—to give the licensee an exclusive right, a bill was filed to have the license contract canceled as made under a mistake of law, and to have suits at law which had been brought to enforce the contract enjoined. The bill was dismissed, the court saying, "There was no doubt a mistake, but it was in the instrument which undertook to express the agreement, and not in the agreement itself."

In Griswold *vs.* Hazard, 141 U. S., 260–284, one Durant was arrested in Rhode Island on a writ of *ne exeat*. He gave a bond, with a surety, conditioned upon Durant's abiding by and *performing* any decree that might be rendered against him. The surety understood that this was a bond conditioned for the appearance of Durant. A decree for a large sum having been obtained against Durant, which he did not pay, the surety filed a bill to cancel or reform the bond so as to exempt him from pecuniary liability on it as surety for the payment of the amount mentioned in the decree up to the penalty of the bond. The relief prayed for was granted, on the ground that the attorneys for the creditor for whose protection the bond was given had misled the surety by leading him to believe when he signed the bond that it was a bond to secure the appearance of the debtor, and not to secure the payment of the debt.

In the United States circuit court for the western district of Tennessee, Hammond, circuit judge, held, in 1887, that whatever rule may prevail in other jurisdictions, it is clear that there can be in the equity courts of the United States no relief from a mistake of law. In that case a controversy between a member of a firm and his individual creditor had

been settled by a compromise which applied a debt due from the creditor to the firm to the satisfaction of the indebtedness of the individual member of the firm. The creditors of the firm afterwards collected the debt from the creditor for their benefit. The court adds as an additional ground for refusing relief was that the parties could not be put *in statu quo* (Allen *vs.* Galloway, 30 Fed. R., 466).

A deed was made which provided that it should be absolute if the grantor failed to pay a certain indebtedness by a fixed date. It was decided that this was a mere mortgage, and it was held that the plaintiff's mistake of law in supposing that he would get a complete title when the time fixed expired if the debt was not paid could not be relieved against, although relying upon his supposed absolute title he had entered into a compromise of other matters with other parties in which the land figured. The court said:

"Every man is charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind" (Rankin *vs.* Mortimere, 7 Watts, 372).

A widow who had received certain furniture, live stock, &c., under her husband's will, gave a receipt for the property, to which she added the words: "I hereby accept under the will." Less than five months afterward she notified the executors that she would claim her share of the estate under the intestate laws. The supreme court of Pennsylvania, speaking through Chief Justice Black, said:

"Every one is conclusively presumed to know the law. Without this presumption no law could be executed. Those who desire to violate it could easily misunderstand it, and ignorance could be feigned where it does not exist. If contracts were binding only on those who know what construction the courts would put upon them, very few would stand. No system of jurisprudence could be administered for a year on this principle without falling to pieces. All codes therefore have adopted the maxim, '*Ignorantia legis neminem*

excusat.' I speak of a mere mistake, and not of misapprehension induced by the fraudulent acts of others. Where the party who commits an error of this kind is led into it by his adversary, who afterwards seeks to have the advantage of it, equity may give relief. So also the rule must be understood as referring to a naked mistake of pure law. In some of the books 'knowledge of one's legal rights' is a phrase used to express that degree of information upon both fact and law which enables a party to judge how far a demand can he enforced by him or against him. The relief which equity gives for such ignorance of legal rights is based on the mistake of fact. Again, the contract cannot be enforced by one who has wilfully, knowingly and fraudulently abused the ignorance of the other party. If a widow who is acquainted with all the facts, but is wholly unaware that by law she has a right of dower, is induced by one who knows the law and at the same time knows her ignorance of it, to release or assign it for a totally inadequate consideration, she ought to be relieved. But where the error is her own and no imposition has been practiced, nor any fraudulent advantage taken, her acts, done under the influence of it are as binding upon her as if she knew the law perfectly. It is not pretended in this case that the demandant's mistake of the law (if she made one) was caused by the defendant, or by the executors of her husband, or by any person interested in the estate, nor is it asserted that they had any more knowledge of the subject than she had. That she was not ignorant of any material fact is conclusively established by the verdict."

Light *vs.* Light, 21 Pa. St., 407–412.

And even in a subsequent case in Pennsylvania in which the question was whether a widow was estopped from claiming land belonging to her which her husband had disposed of by his will, by having received her husband's personalty under his will, and having filed her account as executrix accordingly, in which case the doctrine was laid down that the burden was on the defendants to show that the widow had made an election and *that it was made with knowledge of all the facts,* the court further says:

"What fact then was there to be submitted to the jury? Certainly not the fact whether she received and retained the personal property according to the will. This was conclusively shown by her account. Nor whether she knew the situation, circumstances and value of her husband's estate, or the disposition which he made of it by his will. It was her duty to inform herself and she must therefore be presumed to have known" (Cox *vs.* Rogers, 77 Pa. St., 160).

A married woman by her will undertook to devise land to her husband. The will was void because under the laws of New York at that time a married woman could not dispose of her property by will. Her father was her heir. He, however, encouraged the devisee in selling the land to another person. Afterwards he brought ejectment proceedings against the purchaser. The latter filed a bill to enjoin the action at law on the ground of equitable estoppel. The father claimed, and the court found, that when he encouraged the sale he understood and believed that his daughter's will was valid, and that her husband had a good title under the will. Yet it was held that he was estopped. In delivering the opinion in the case Chancellor Kent said:

"The presumption is, that every person is acquainted with his own rights, provided he has had reasonable opportunity to know them; and nothing can be more liable to abuse, than to permit a person to reclaim his property, in opposition to all the equitable circumstances which have been stated, upon the mere pretence that he was at the time ignorant of his title. Such an assertion is easily made, and difficult to contradict. It is rarely, that a mistake in point of law, with full knowledge of all the facts, can afford ground for relief, or be considered as a sufficient indemnity against the injurious consequences of deception practiced upon mankind; and if the person, as in this case, is not merely silent and passive, but gives explicit confirmation to the title of the party in possession, and encourages him to sell, and encourages the purchaser to buy, the case is greatly altered, and equity and policy equally dictate, that he, and not the purchaser, ought to suffer. His ignorance of the law ought not to protect him from the operation of the rule of equity.

He could easily have dispelled that ignorance, for he had the fact of the will of his daughter before his eyes; and if he may be allowed to plead his voluntary ignorance, in destruction of equitable rights, growing out of his own acts and assertions, the grossest imposition, and the greatest fraud, might be practiced with impunity. It would seem, therefore, to be a wise principle of policy, that ignorance of the law, with knowledge of the fact, cannot generally be set up as a defense; and it appears to be settled by a course of equity decisions, that ignorance of one's legal right, does not take the case out of the rule, when the circumstances would, otherwise, create an equitable bar to the legal title."

Storrs *vs.* Barker, 6 Johnson Chancery Rep., 166.

In Whitwell *vs.* Winslow, 134 Mass., 343–345–346, the plaintiff had received from the defendant a promissory note which was not negotiable because of the omission of the words "or order." The defendant had told the plaintiff when he delivered the note to him that it was not necessary to make it payable to the plaintiff's order—that the plaintiff could sue upon it as it stood. Yet it was held that the plaintiff could not recover because even if he had been induced to take the note by what the defendant said to him as to its negotiability "it was a statement of an opinion upon a question of law where the facts were equally well known to both parties."

A good review of the authorities on this question of relief from mistakes of law will be found in 55 Am. St. Rep., 494–520. See especially the paragraph headed "Exceptions to the general rule."

In all the above cases except three relief from the results of a mistake of law was denied. The exceptional cases are Wheeler *vs.* Smith, 9 How., 55, 82; Snell *vs.* Insurance Company, 98 U. S., 85, 92, and Griswold *vs.* Hazard, 141 U. S., 260. *In each of these cases the decision is on the express*

ground that the injured party had been led into his error by the other party or by his agent or attorneys.

In the case at bar it is not even charged—and certainly there is nothing in the evidence tending to prove—that either Mrs. Taylor or Mrs. Norment or anybody else advised the caveator that by taking under the will of his grandfather he would not preclude himself from thereafter assailing the will. It is not pretended that the caveatees or anybody else told the caveator that if he agreed with his grandmother not to contest the will of his grandfather in consideration of her giving him $600,000 or some other sum out of the personal estate, and received from her over $100,000 under that agreement, that he could keep the $100,000 and ignore the contract. It is a bald case—an alleged mistake of law—sustained only by the statement of the party alleging ignorance. If such a plea so sustained is sufficient to enable the party to go to a jury, it must be good in every case of equitable estoppel. The heir who wrote the letter in Dickerson *vs.* Colgrove, 100 U. S., *supra*, could have avoided the effect of it by swearing that he did not know that one who tells another he claims no interest in certain land, thereby inducing that other to change his position in regard to the land, would be precluded from afterwards claiming the land; and so in all the other cases on estopped cited in this brief or to be found anywhere.

IV.

THE ALLEGED TENDER.

1. *The Evidence.*

In his reply to the estoppel set up by the caveatees the caveator averred that when he learned in 1900 what his "rights" were he wrote a letter to the caveatees in which he tendered himself *ready to account* to them for their two-thirds share in the Young law building (24), and that "as

soon after the death of Sarah Utermehle as he became aware of his real rights under said agreement with said widow and the petitioners he served notice upon the latter that as a matter of fact what portion he took of the estate of Sarah Utermehle was taken by him as one of the heirs-at-law of both George W. Utermehle and Sarah Utermehle, *for which he is willing to be charged* as part of his distributive share" (28).

The letters referred to were put in evidence during the direct examination of the caveator (30, 69, 93). He admitted, on cross-examination, that for what he had received under the will of his grandfather, both directly and through his grandmother, he had never made any offer to refund or account in any way except the offer contained in those letters. In the letters, after notifying the caveatees that he denied the validity of the will of his grandfather, he stated that he contended that it had never been operative as to real estate, and that in that event the real interest vested in him in the Young law building was merely a one-third interest, and he added that he tendered himself "*ready to account upon demand*" to both Mrs. Norment and Mrs. Taylor for their one-third interest as heirs-at-law of their father in that building and in the rents and profits of it from the time of their father's death. He further stated in the letters that he tendered himself "*ready upon demand to make proper settlement*" to Mrs. Norment and Mrs. Taylor for the $750 note and accrued interest. He gave no notice that he intended to dispute the will as a will of personal property. He made no offer to return or even to account for the personal property, amounting to over $100,000, which he had received from his grandmother, whose authority to dispose of it was derived from her husband's will; and he made no offer to return or even to account for the $13,500 which had gone to his creditors in the sale of his one-third interest in square 765, which interest he acquired also through his grandmother under

authority of the will he now seeks to dispute; and, what is even more important, he did not even refer to the $9,000 which his grandmother had paid to certain legatees under the will or to the several hundred thousand dollars of personal property which passed to Mrs. Utermehle under the will and which she had disposed of in charities or in some other manner.

The caveator stated that up to the time he gave his testimony he had received no answer to either of these letters and had received no communication of any kind from Mrs. Taylor or Mrs. Norment (70). In his answer, filed November 3, 1900, he averred that he waited for two months after writing the letters before taking any legal action in the case, and that during that time no response to the letters was received from the caveatees (29). Mr. Lambert, one of his counsel, testified that two or three days after the letters were sent he was informed by one of the counsel for the caveatees "that there was going to be a contest; that the matter was going into litigation;" that "contest" or "fight" was used in this conversation between counsel, probably both words, and that he, Lambert, was informed that the letters had been received. Mr. Lambert further testified that, having received these declarations and having received no other answer to the letters of tender, he told his client, the caveator, that there was going to be a fight, and that there was no necessity for a further tender (114).

The only evidence as to the ability of the caveator at the time the letters were written or at any subsequent time to make good the so-called tender was as follows:

The caveator himself was asked by his counsel whether he at that time was in a position to carry out the tender made in the letter, if it had been accepted, and he replied that he was (70). On his cross-examination he stated that when he wrote the letters he did not mean that he was simply to be charged in an accounting with the rents and profits of the Young law building, but that he did mean that he was ready

to produce the property; that he was prepared at that time to carry out the letter; that the rents which he had collected from the Young law building before he sold it amounted to about $1,800; that he could have gotten the money to pay back this $1,800, having made arrangements with Mr. Lambert to get that money as soon as he wanted it; that he did not know of his own knowledge who was to advance the money; that it was not merely his intention that he should be charged in his account with the amount which he got if he succeeded in breaking the will; that in the letters he agreed to deliver back the Young law building and the supposed legacy of the $750 note; that the arrangement as to obtaining money to carry out the offer made in the letters and the arrangement for obtaining the money to get the property back was through Mr. Handy, and that witness knew nothing about it, except what Handy said and as to the arrangement through Mr. Lambert he had no knowledge except what Mr. Lambert had told him (106–107). Mr. Lambert testified that when the letters were written he had made arrangements and had under his control upwards of $30,000 in cash; that he had sufficient money to substantiate the tender and make it good and would do it; that he had the money at the time the letters were written and for several months thereafter (114). On his cross-examination, when asked in regard to the $30,000 in cash, he said that he thought he had about $20,000 of it in bank at the time; if not he could have gotten it in a few moments; that his idea was, although he did not look it up, that his deposits at that time in four different banks, which he named, amounted to $25,000; that he had other sources upon which he could draw, and could have obtained $20,000 more from his mother if he had wanted it; that he could not say he had made any arrangements when the letters were written about the $25,000, but knew if he went to the bank and asked for it he could get it (114–115).

At this point counsel for the caveator stated to the court

that no tender had been made in relation to what the caveator had received under the grandmother's will, but there was an offer in the pleadings to account for that part of it (115). It is not a matter of much importance, perhaps, but the language referred to is not susceptible of such an interpretation. It refers (28) to such an offer as having been made in the letters; but the letters contain no reference to the money or interest in land received by the caveator through his grandmother.

Mr. Handy, the real-estate broker, testified that in May, 1900, at the request of the caveator, he telephoned another real-estate broker, Mr. Easterday, who, he understood, had the Young law building for sale; that Easterday told him that he, Easterday, had to get it from Early and Lampton, a firm of real-estate brokers who controlled it; that he called up Easterday a second time and the latter told him he could not do anything because there were negotiations for an exchange; that in a day or two Easterday telephoned him he would give him an option; that witness thinks, according to his best recollection, that this option was for $25,000, and was, he thinks, for three or four days; that this was all verbal, and that he did not report the fact that he had the option to Mr. Utermehle (115–116).

2. *Tender—The Law.*

The authorities are practically unanimous in support of the proposition that before one who has received a legacy or taken any other benefit under a will can be heard to assail the will he must return or tender back to the executor that which he has received, as a condition precedent to the institution of any proceedings assailing the will. We have seen that it is not contended in this case that anything received by the caveator has been returned to anybody, and that it is also conceded that no tender or offer of any kind was made to the executrix under the will of George W. Utermehle, or

since her death, to anybody standing in place of the executrix and representing his estate.

Nor is it claimed that as to the sum of over $100,000 received at various times by the caveator from the executrix (over and above what was given to him by the will of her husband) or from her estate under her will bequeathing what she had received from her husband by virtue of the will here in controversy, any tender or offer of any kind was made to any person prior to the filing of either of the caveats in this case, or even in the caveats themselves.

In this regard, as we have seen, his claim—unfounded, as has been shown above—is that in his answer to the estoppel set up against him he expressed a willingness to account for what he had received from his grandmother or her estate.

Unless, therefore, the letters of May 19, 1900, to Mrs. Taylor and Mrs. Norment constitute a sufficient tender, no such tender has been made.

"It is still a condition precedent to the right of rescinding a contract that the party against whom relief is sought *shall be restored substantially to the position he occupied before the transaction complained of;* the right to rescind can be exercised only upon the terms of restoring the consideration received or, so far as is at all permitted, its value. This is strikingly illustrated in the case of attempted defenses to actions upon contracts of sale obtained from the purchaser by fraud. The injured party cannot allege the fraud in bar of the action without *tendering back the property received;* though he may show the fraud in recoupment of the amount the plaintiff would otherwise be entitled to recover."

* * * * * * *

"The rule requiring tender is not dispensed with by evidence that the injured party disposed, in whole or in part, of what he had received before having become aware of the misrepresentations. He will then be left to an action for damages, or to a right to have the contract price reduced if the price remains unpaid; and the former he cannot have if the misrepresentation was innocent" (1 Bigelow on Fraud, 420, 423).

A mere allegation in a pleading that one tenders, is no tender (1 Beach on Modern Law of Contracts, sec. 299). It is not every offer to deliver that amounts to a tender. The offer must be made under circumstances which give to the other party the opportunity of examining and receiving the thing tendered (*id.*, 301). Tenders are always to be considered *stricti juris*. If a tender is not legal in every respect even a court of equity will not support it nor supply a defect. Nor are tenders more favored at law; the rules which govern them are strict and must be strictly applied. Therefore a tender must always be kept good. * * * The failure to keep the tender good by using the money after tender destroys the attribute of a legal tender. * * * The burden of proof is on the one pleading tender to show that he set the money aside and has not had the use of it. If he has had the use of the money, this destroys the effect of a tender (*id.*, sec. 302).

In Talty *vs.* Freedman's Savings and Trust Co., 93 U. S., 321, Talty had placed in the hands of one Kendig his own note for $3,000 and had given to Kendig as collateral security a certificate representing a claim against the District of Columbia. Kendig sold the certificate to an innocent purchaser. Just before the maturity of the note Talty called on Kendig "and offered to pay the note and demanded back the collateral." Kendig declined to accept the proposition and insisted that the agreement between him and Talty was that he, Kendig, was to have the right if he chose to take the certificate at ninety cents on the dollar, and he offered to settle with Talty on that basis. The court held that Talty's offer to pay was not equivalent to an actual tender.

In a case in this jurisdiction, in which a bill was filed for the specific performance of a contract for the sale of land, the vendor had been tendered the exact amount due in the form of a certified check for the whole amount of the purchase-money. It was held that this tender was insufficient. Chief Justice Alvey, speaking for the court, said:

"Before the plaintiff could rightfully demand performance on the part of the defendant he should have tendered strict performance on his own part."

Barbour *vs.* Hickey, 2 App. Cas. D. C., 207.

"Applying the principle that knowledge is essential to constitute a valid election, it is established that where the act is induced by deception or fraud, or where the person electing acted under an ignorance of the facts or under a misapprehension of his rights, and innocent third parties will not suffer by a revocation, the act may be revoked or set aside. But such an election can be revoked only *by restoring the property* received under it" (11 Am. & Eng. Ency. (2d ed.), 98, 99).

Every legatee who puts in suit the validity of a will *must bring into and leave in the registry of the court* the amount of his legacy, if paid, to abide the event of the suit (Braham *vs.* Burchell, 3 Addams' Ec. R., 243).

"A party who has received a legacy under a will cannot be permitted to contest the will without *repaying the amount of the legacy or bringing the money into court.* * * * But if the party so having received a legacy afterwards desires to contest the will, there is a great reason that he should *tender to the executor or bring into court the amount received.* The security of the executor may require this and if the party can withhold it he may at one and the same time treat the will as valid and invalid. * * * In ordinary cases, therefore, when a party seeks to repudiate a will as insufficient, he must do so wholly and entirely by refusing until it has been established to receive the benefit of it, or if anything has been received, *by returning it to the executor, or placing it in the custody of the court* that the executor may have it in case the judgment should be against the validity of the will" (Hamblett *vs.* Hamblett, 6 N. H., 333, 337, 338).

In Chipman *vs.* Montgomery, 63 N. Y., 223–234, in an action for the construction of a will it appears that two of the parties to whom the will gave legacies had received and receipted for their legacies in whole or in part. It was held

that because they had accepted the benefits of the provision made for them in the instrument they could not be heard in opposition to other parts of it, except upon proof that they had not intelligently elected to take under the will and *the return of all they had received.*

In the same State, in the subsequent case of *In re* Peaslee, 73 Hun., 113–115, a daughter of the testator had received from the executors several payments which were made to her on account of a bequest given her by the will. Afterwards, and within the time allowed by law, she filed a petition in the surrogate's court assailing the will. The executors answered that they had made to the petitioner the payments above referred to, and that she had not offered to return or refund the same, and demanded accordingly a dismissal of the proceeding. The court quotes with approval the above-mentioned case of Chipman *vs.* Montgomery on the point as determining that the petitioner must show that she had not intelligently elected to take under the will and that she had returned all that she had received under it. It then goes at length into the authorities in support of the general proposition that he who takes a benefit under one provision of a will must allow all the other provisions of the instrument to be carried into effect, and adds:

"Here he says no injury can result to the executors or any one else, because the petitioner is permitted to contest the will while retaining the $7,000 which she received from the executors, because if the will be set aside she, as one of the next of kin, will be entitled to receive a larger sum of money than $7,000 and, therefore, the executors can be amply protected by the surrogate. It may be true that if the contest should proceed it would so turn out, but of that we are not assured.

"It does not appear that should the petitioner be successful in her contest, that as a result her mother's intestacy will be established.

"*There may be other and prior wills in existence,* the validity of one of which may be established, with the possible result that the petitioner will not receive thereunder a legacy suf-

ficient in amount to make good the advancement to her by these executors. Certainly the contrary cannot be safely assumed.

"The fact that the petitioner received this money, and expended it before becoming aware of the facts which encouraged her to enter upon a contest of the will, may perhaps be unfortunate for her. If misfortune it be, it arises of course from the necessities which induced her to expend the money. Where a person asks that a rule be not applied, on the ground that the reason upon which it is founded is not present, the burden rests upon him to establish clearly the facts which he relies on to support his contention. The petitioner took the money and used it, and until she puts the parties in a position where, whatever the results may be, no one can be the loser, because of the payments originally made to her, she is not in a situation to attack the will."

Where a testator left an estate of nearly half a million dollars and by his will gave to one of several children nearly all of his estate, it was held that one of the "practically disinherited" children was not estopped to dispute the will by having accepted several small sums under it. The court intimates that it is doubtful whether "the receipt of money by a legatee claiming to be entitled to receive it and much more as an heir-at-law can be treated as an election to affirm the will," but decides the case on the ground that such a legatee may contest the will if he *returns the amount of the legacy to the executors or brings it into court* (Miller's Estate, 159 Pa. St., 562, 574; same case, 166 Pa. St., 97).

In Brown *vs.* Appleman, 83 Mo. App., 29, all the parties in interest had assented to a settlement of an estate as in case of intestacy, because one of the attesting witnesses had refused to testify that the testator at the time he executed the will was of sound mind. Afterwards some of the parties sought to have the will admitted to probate. They admitted that an administrator had been appointed and had distributed the estate as in case of intestacy, but contended that the proceedings in that case were against their consent and contrary to their known wishes, and they stated that

"*they tender and offer to pay into court all moneys received by them in the distribution.*"

It was held, however, that the petitioners could not maintain the proceeding, the court saying:

"The appellants seek to avoid an estoppel by conduct by stating that they accepted their share as distributees of the estate from the administrator, and took the parts distributed to them in the partition proceedings, but gave notice that they objected to the administration and objected to a partition and now offer to undo what they have done. They put themselves by their reply in the position of protesting, yet consenting; of denying, yet affirming and ratifying what they had done; of claiming that there was a will, yet repudiating it by accepting distribution of the estate contrary to and against the provisions of the will—of 'blowing hot and cold.' The plaintiffs by their conduct are estopped to assail the existence of the will by which they claim a greater estate than they have already received."

In Balue *vs.* Taylor, 136 Ind., 368, it is said to be elementary—

"That where a party to a contract seeks to avoid it for fraud, or asks to rescind it on the ground of fraud, he must tender back to the other party whatever of value he received for the property which he seeks to recover by the rescission,' and "that if a party, upon the discovery of fraud in the procuring of a contract, fails to return, or offer to return, whatever of property or thing of value he has received under the contract, he thereby affirms the contract, and cannot afterwards be heard to complain."

Some cases have been cited in the opposing brief in support of the proposition that in such a case as this no tender is required, or that an offer to account made in the pleadings is a sufficient tender. The principal case relied upon in this connection is Madill *vs.* Snyder, 61 Kansas, 15. In that case the court quotes from the above-mentioned cases of *In re* Peaslee, 73 Hun., 113; Hamblett *vs.* Hamblett, 6 N. H. 333; Holt *vs.* Rice, 54 N. H., 402, and Miller's estate, 159

Pa., 562, as all requiring repayment as a condition precedent to the assault upon a will. The court then says, however, that an offer to restore made in the pleadings is "sufficient in a case of this character." The only case cited by the court in support of this proposition is Thayer *vs.* Note, 59 Kansas, 181, in which case it was held that it is sufficient in a bill to rescind a contract to offer to return what has been received. And Shuee *vs.* Shuee, 100 Ind., 477, and 1 Daniel's Ch. Pl. & Pr., 6th ed., 385, are cited. Upon reference to the case referred to in 100 Indiana, it will be seen that it holds that the law seems to be as stated, because in equity the court can protect the defendant by requiring restoration or an accounting for property received by the complainant as a condition precedent to rescinding the contract. The same statement is made in the paragraph in the work of Daniel referred to. And in note *a* to the page in question occurs the following passage:

"In Thomas *v.* Beals, 154 Mass., 51, which was a bill to set aside a collusive sale, Holmes, J., said: 'A bill in equity is not like an action at law, brought on the footing of a rescission previously completed; for instance, to replevy a horse which was obtained by a fraudulent exchange and to which the plaintiff has no right unless he has restored what he has received (Thayer *v.* Turner, 8 Met., 550). The foundation of this bill is that the rescission is not complete, and it asks the aid of the court to make it so. It is objected that at least the bill ought to offer restitution. We are aware that in many cases an offer to do equity has been held necessary. But in the case at bar the court has power to impose equitable conditions upon the relief granted the plaintiffs. And it is hardly, if at all, conceivable that this decree in any event could be for the relief of the defendant alone against the plaintiffs, as in the case of an account, where, nevertheless, an offer is no longer necessary (Goldthwait *v.* Day, 149 Mass., 185). The plaintiffs, by seeking to set aside the conveyance, have elected to adopt all the consequences of rescission.'"

It will be seen that the authorities cited by the court in the case in 61 Kansas do not in the least degree support the conclusion which the court reaches. In equity a mere offer to account may be sufficient, or even that may be dispensed with, because when the chancellor enters a decree rescinding a contract he has the power to so mold the decree as to require a proper return or accounting from the complainant; but a court of common law or a probate court has no such power, and as the reason for the exception fails the rule itself must fall. In this case, for instance, the will must be admitted to probate as a will of real estate unconditionally or it must be denied probate.

In this connection counsel also refer to the case of Wheeler *vs.* Smith, 9 How., 55. That was a case of a bill in equity filed to rescind a contract, and what has just been said in regard to the Kansas case applies to it. But in addition to this the court, in its opinion in that case, does not refer at all to the matter of tender. Objection on the ground that no tender had been made was suggested by counsel for the defendant in his brief (71); but although a full abstract appears to be given of the brief filed in reply, this point is not mentioned, nor is it referred to by the court. For some reason, therefore, which does not appear in the report of the case this point must have become immaterial.

Opposing counsel refer, also, as showing that no tender is required, to the case of Montgomery *vs.* Pickering, 116 Mass., 277. In that case the owner of a parcel of land in Boston sold it for $7,000, in ignorance of the fact that the city had just condemned it for about $9,000. The vendee knew of the condemnation proceedings and concealed the fact from the vendor. The vendee filed a bill in equity to rescind the sale, and it was held that it was not necessary to maintaining the suit that he should return the $7,000, the court saying:

"Nor was there any necessity, upon the facts disclosed, for the plaintiff to restore or offer to restore the defendants to

the position in which they were before the deed was executed. By the payment made to her upon delivery of the deed the plaintiff took nothing from the defendants that she was not entitled to, and there was nothing, therefore, on her part to be restored."

Counsel also rely in this connection upon Howard *vs.* Railroad Company, 14 App. Cas. D. C., 297. That was a case of an action for personal injuries, in which the plaintiff sought to avoid the effect of a release which had been given to the defendant shortly after the accident. In that case it was held that a tender of the money received was sufficient if made at the trial. But this is put upon the ground that the plaintiff had signed the release on the faith of a statement made to her by an agent of the defendant that it was merely a receipt *for a gratuity.*

In delivering the opinion of the court in the last-mentioned case, Mr. Justice Shepard says that even if it were a case like that of Lyons *vs.* Allen, 11 App. Cas. D. C., 543, the court would be inclined to hold that a tender made any time before the case was finally submitted to the jury was good, citing Smith *vs.* Holyoke, 112 Mass., 517.

In the Massachusetts case referred to the decision was put expressly on the ground that the plaintiff did not know until the paper was read at the trial that it was a release. She had signed it believing it to be a receipt for a gratuity.

In the case of Lyons *vs.* Allen, 11 App. Cas. D. C., 549, a judgment for the plaintiff was reversed on the sole ground that the money paid to the plaintiff by the defendant when the alleged fraudulent release was given had not been returned.

Chief Justice Alvey in delivering the opinion of the court in that case, said:

"It is a condition, however, to the exercise of the right so to avoid the effect of the release, at law as well as in equity, that the party seeking to rescind or avoid the instrument must restore the consideration received, or put the other

party in *statu quo;* and this principle applies as well in cases of rescission or avoidance on the ground of misrepresentation and fraud as to other cases (Bartleet *v.* Drake, 100 Mass., 174, and cases cited). It would seem to be but right and just, that a party after accepting a certain sum in settlement of an unliquidated claim for damages under a contract or release, and afterwards seeks to pursue his remedy for the damages on the ground that the settlement was procured by fraud, or is not binding upon him, that he should first refund the amount received. This principle is settled by many express decisions of courts of the highest authority, though there are cases to be found to the contrary. The great weight of authority, however, is clearly in support of the principle just stated, and we think it just and right upon principles of reason and equity (Coolidge *v.* Brigham, 1 Metc., 547; Estabrook *v.* Swett, 116 Mass., 303; Brown *v.* Hartford Ins. Co., 117 Mass., 479; Mullen *v.* Old Colony R. Co., 127 Mass., 86; Burton *v.* Stewart, 3 Wend., 236; Gould *v.* Bank, 86 N. Y., 75; Bain *v.* Wilson, 1 J. J. Marshall, 202; Tenn. R. Co. *v.* Hays, 83 Ga., 558; Home Ins. Co. *v.* Howard, 111 Ind., 544; Vandervelden *v.* Chicago, &c., R. Co., 61 Fed. Rep., 54)."

In the brief for the appellant here it is urged upon this court that its decision in Lyons *vs.* Allen is inconsistent with the following cases:

Union Pacific R. R. Co. *vs.* Harris, 158 U. S., 326: In that case the bill of exceptions did not contain all the evidence (330). Nothing is said on the subject of tender in the opinion. The only reasonable inference is that one had been properly made, so that there was nothing said about it either by counsel or by the court.

Girard *vs.* St. Louis Car Wheel Co., 123 Mo., 358: In that case four out of seven judges held that the point as to failure to return the tender could not be made in the appellate court because it was not made at the trial court, either in the pleadings or in asking instructions to the jury. The other three judges dissented. The dissenting opinion is perhaps as full and able a review of the authorities holding a return or tender necessary as can be found anywhere.

Westlake *vs.* Button, 77 Mo., 47: That was an action to recover an alleged excess over the proper rate of a certain water-license tax. All that was held in that case was that it was not necessary that the plaintiff should have tendered what he admitted to be due on account of the tax because what took place between him and the authorities showed that such an offer would have met with "prompt and peremptory refusal."

In Smith *vs.* Holyoke, 112 Mass., 517, as has been seen above, it appeared that the plaintiff did not know that the paper which she had signed was a release at all until it was produced at the trial, and the decision was put upon that ground.

Mullen *vs.* Old Colony R. R. Co., 127 Mass., 89: This was another of the cases in which a release was signed, believing it merely to be a receipt for a gratuity. The decision is put upon that express ground, the court saying that one who seeks to assail a compromise settlement must first return what was paid to him under the settlement.

O'Donnell *vs.* Clinton, 145 Mass., 461: In that case the town had taken a part of the plaintiff's land, including a part of his house. He received $200 from the town and gave a receipt in full, which he, however, was led to understand was a receipt for the value of the land only. The court held that in order to avoid the effect of the receipt it was unnecessary for the plaintiff to make a tender, but that a sufficient tender had been made.

As to the claim that a tender is unnecessary where the other party has made it evident that a tender would not be accepted, we do not dispute that that is the law; but here all that the caveatees did in reply to the letter relied on was to employ counsel, and counsel informed the attorneys for the caveator that there was to be a "fight" or "contest." There was in this nothing inconsistent with an intention to defend on the ground that no tender had been made. Moreover, the persons to whom the offer to account was made

and who employed counsel to defend their property were not the representatives of the estate of George W. Utermehle, and therefore they could not waive a tender if they had been disposed to do so.

Long after this case was decided in the Court of Appeals the supreme court of Missouri was called upon—in February, 1894—to determine a case involving similar questions. The opinion in that case is so pertinent here that we quote the following extract from it:

"The sum of the matter, then, is that, as a general rule, one who has received a benefit under a deed, will, or other instrument cannot thereafter contest its validity, but the general rule is subject to this qualification: That if the benefit was received without a knowledge of his right to elect between the benefit so conferred and of his right to the property outside of the deed, will, or instrument, or if he was induced by fraud or deception to accept the benefit conferred by the instrument, he may revoke the election, and contest the validity of the instrument, and claim under the law, provided that innocent third persons will not suffer by a revocation and provided there has been no unreasonable delay in exercising the right of revocation, and provided he pays into court the benefits received. Apply this rule to the case at bar, and the case is easily solved. It expressly appears from the face of the petition that the plaintiff knew that she had a right to elect to take under the will or by operation of law at the time she received the legacies, for she says she 'accepted the same under protest, and insisted that the will was invalid, and only received the same because, under the law, she would be entitled to one-third of the entire estate—a sum and an amount much larger than the amount received by her as herein stated.' Therefore the plaintiff acted with full knowledge of her legal right of election, and there is no charge that she was induced to accept the benefit by any fraud or deception. It does not appear how long she waited after receiving the benefit before she attacked the validity of the will. The allegation that she is ready and willing to pay the amount received into court, or to have it deducted from

her share of the estate, if the will is set aside, is not sufficient to bring her within the rule which entitles one to contest an instrument after receiving a benefit under it, for the rule requires that the benefit received shall be actually paid into court at or before the filing of the suit. In addition to this, innocent third persons will suffer if she is allowed to revoke her election upon returning the benefits she has received. The major portion of the benefits she has received arose out of the residuum of the estate. That means that all the special legacies had been paid before such residuum was ascertained and paid. These special legacies arose solely out of the will, and, without the will, that money would have gone to other persons. Upon the faith of the plaintiff's acceptance of the benefits conferred upon her by the will, the executors paid out the special legacies to other persons. The plaintiff stood by and saw the executors do so. If the plaintiff should now be permitted to have the will set aside, upon payment into court of the benefits received by her, the special legacies paid by the executors would be lost to them, for the money so expended would go to the heirs, of whom the plaintiff was one. Thus the executors would suffer by a revocation. It is true that the statute permits a will to be contested at any time within five years after its probate in common form, and the statute contemplates that the estate may or will be wound up before that time, and persons who take under a will know that the estate thus derived is liable to be divested by a successful attack thereafter upon the will. But whilst this is true, the lawmakers never intended to permit a legatee under a will to accept the benefits conferred by the will, and then stand by and see the estate wound up, or practically wound up, and then begin proceedings to contest the will, upon returning only the amount received by the contesting legatee. Such a proceeding falls within the rule that denies the right to contest where there has been unreasonable delay. In short, it is plain from the petition that the plaintiff thought she could accept the benefits, and then contest the will, and simply have the benefits received deducted from her share of the estate after the will was set aside. By so doing she stood to gain everything if she succeeded, and to lose nothing if she failed, in the contest proceedings. The law does not sanction such a speculative proceeding. It follows that the plaintiff has not shown herself entitled to maintain this action."

Stone *vs.* Cook, 78 S. W. Rep., 80.

V.

The judgment should be affirmed because the appellant has not shown affirmatively that any evidence was excluded by the court below which, if the estoppel had been out of the way, would or could have led to any different result.

Counsel for the caveator offered, by the mouth of Seth A. Terry, testimony "relating to the mental condition of the alleged testator, George W. Utermehle, prior to the making of his will in December, 1887," and further offered to prove by the same witness that shortly prior to December, 1887, the testator was of unsound mind and not capable of executing a valid deed or contract (158). Objection was made to this evidence on the ground that the evidence already in the case showed that the caveator was estopped from contesting the will on the ground of mental incapacity or on any other ground. Counsel for the caveatees thereupon asked counsel for the caveator if they had any further evidence to offer on the issue of estoppel, and counsel for the caveator stated that before answering the question "in order to raise the point with respect to both issues" the caveator offered to prove by Eugene C. Hannan that he (Hannan) had had opportunities of observing the testator when in the company of his daughter, Mrs. Taylor, and her husband, "and that in the opinion of the witness the testator was unduly influenced" by Dr. and Mrs. Taylor in the making of his will (159). Counsel for the caveator further stated that this testimony was simply the first step; that they had a number of witnesses whom they proposed to examine under the heads of mental incapacity and undue influence, and that they also had witnesses whom they proposed to examine as to

the issues of fraud and duress. Thereupon counsel for the caveator stated that the caveator had no further evidence to offer under the head of estoppel or tender, but that they desired to proceed with their case upon the other issues.

The court, after hearing arguments, then held that the caveator, *on his* own evidence, was estopped to contest the will of his grandfather, and instructed the jury how to answer each of the issues (171). When the third issue was reached, which raised the question whether the testator was of sound mind when he made his will, counsel for the caveator excepted to the instruction of the court to the jury to answer that question in favor of the will, stating that the caveator was prepared to offer testimony as to that issue. A colloquy then took place between counsel and the court, during which counsel for the caveatees gave notice that he should make the point that if only a general offer of testimony was made it would be insufficient. Thereupon counsel for the caveator stated and the court agreed that the understanding between counsel for the caveator and the court was that the court would not hear any evidence from the caveator bearing upon any of the issues other than those which raised the question of estoppel (171–173).

If the court had refused to allow counsel for the caveator to offer evidence upon any of the issues other than estoppel, and had refused to allow counsel for the caveator to make any offer in that regard, it might well be urged here that the caveator had done all that was required of him, and that this court should presume that he had some competent evidence on some or all of the other issues.

But it will be seen that counsel insisted that their understanding with the court was that they should not be required to offer any such testimony. The exclusion of further evidence, or of any sufficient offer as to what that evidence would be, was made at their own volition and after counsel for the caveatees had gone out of their way to notify them that it would be insisted that their exception to the

exclusion of evidence would not be good unless there was a sufficient statement of what that evidence would be to enable the court to say that it might, in some aspect of the case, have entitled the caveator to a verdict in his favor on the issues other than estoppel, or some of them.

It will also be seen that, although counsel claimed that this was the understanding between them and the court, yet as a matter of fact they did make an offer of evidence both as to the issue of unsoundness of mind and the issue of undue influence. That as to mental unsoundness was fatally defective because, first, the witness by whom an opinion was offered on the subject did not state any fact, and no offer was made to prove by him any fact from which an opinion as to the unsoundness of mind of the testator could have been drawn, and, secondly, because his opinion related to a date prior to the date of the will, and no offer was made to show either that the alleged unsoundness was of such a character that a presumption of its continuance would arise, or that it did in fact continue to exist at the time the will bears date. The evidence offered on the issue of undue influence was manifestly insufficient, because the offer was to give evidence by the witness Hannan, that *in his opinion* the testator was unduly influenced in the making of his will by Dr. and Mrs. Taylor. His opinion of this subject would, of coure, have been inadmissible, and if it were admissible it would have to be based upon some fact which was made known to the jury.

It is respectfully submitted that, without regard to the ruling of the court directing a verdict in favor of the caveatees on the issue of estoppel, the judgment should be affirmed, because in his bill of exceptions the caveator has not shown that he was injured by that ruling, whether it was right or wrong.

And certainly unless, the law requires it, an appellate court should not put the caveatees in such a case as this to the enormous expense of another trial when, for all that the

caveator shows to the court, at the end of that trial the jury will have to be instructed to find a verdict in favor of the will upon each of the several issues of undue influence, fraud, duress, and coercion.

In Packet Co. *vs.* Clough, 20 Wall., 528, an error assigned was the rejection of a certain deposition. As to that point Mr. Justice Strong, in delivering the opinion of the court, said:

"Of this it is sufficient to say that we have not before us either the deposition or any statement of what it tended to prove. We cannot know, therefore, that it was of any importance, or that, if it had been admitted, it could have had any influence upon the verdict. A party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted it might have led the jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of our twenty-first rule. By that rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence that could have had no effect upon the verdict."

In Railroad Co. *vs.* Smith, 21 Wall., 255, exception had been taken to the refusal of the trial court to allow a witness to answer certain questions which were set out in the record. It was held that the exception could not be sustained, because the record did not show what it was proposed to prove in answer to them.

Mr. Justice Field, in delivering the opinion of the court, said:

"But although the interrogatories were pertinent and proper in themselves, we are unable to decide whether any harm resulted from the ruling of the court in excluding them and the answers obtained, for the answers are not contained in

the record. For aught that we can know, the witness may have answered that he was unable to state what injury or damage, hindrance or delay was occasioned to the company in the running of the road by the defective character of the bridge, or what number of hands were employed or would have been necessary if the bridge had been properly constructed. We cannot, therefore, see that any harm resulted to the defendant from the exclusion. Whatever may be the rule elsewhere, to render an exception available in this court it must affirmatively appear that the ruling excepted to affected or might have affected the decision of the case. If the exception is to the refusal of an interrogatory, not objectionable in form, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related, and that such facts were material. Such has been the decision of this court in several cases, and was distinctly affirmed at the present term in the case of Packet Company *v.* Clough."

In U. S. *vs.* Neverson, 1 Mackey, 152—a capital case—the trial judge had permitted a witness to testify in favor of the prosecution whose name had not been given to the defendant in advance of the trial, as required by statute. While it was held that this was error, the court, following the two cases in this court above cited, held that because the bill of exceptions did not show what the evidence was which the witness had given, and the court could not say whether it was material or whether the defendant sustained harm by it, the exception would have to be overruled.

VI.

The court did not err in instructing the jury to render a verdict in favor of the will on the issues of undue influence, fraud, duress, and coercion.

Although the record in this case does not show it, counsel for the caveatees urged in the court below that the issue of estoppel should be tried and determined first, to the end that if it should be determined that the caveator was estopped from contesting the will the time of counsel and the court and the expense to the parties of a long trial of the other issues should be avoided. In our view the case was analogous to those cases in which it is disputed that one who seeks to contest a will as heir is an heir, or those in which a party seeks to contest a will on the ground that he is a legatee under an earlier will which his adversaries insist was revoked before the later will was executed. In all such cases, it seems to us, the right of the caveator to interfere in the matter at all should be determined before entering upon a trial of issues with which it may turn out he has no concern. However, Mr. Justice Cole, to whom this matter was presented, did not agree with us on this point.

The trial judge held properly, we submit, that since the caveator was estopped to contest the will he could not be heard to offer evidence against it.

And certainly if this court shall agree with the trial court in holding that the caveator is estopped to contest the will, or should agree in our contention that his failure to restore (or to even offer to restore to any representative of this estate of his grandfather) what he had received under the will, of itself precludes him from contesting it, it would follow that the ruling of the trial court in relation to the other issues, whether correct or not, did the caveator no harm.

VII.

The trial court did not err in excluding the testimony of the caveator as to declarations made to him by the testator.

If such declarations had been offered for the purpose of showing that at the time they were made the testator was of unsound mind, they would, of course, have been competent for that purpose. Counsel, however, in offering one of these declarations stated that they were made at the time when it was conceded by everybody that the testator was sane, and in offering the other said that it was made at a time when it might be claimed he was sane (55, 56). In offering this evidence counsel stated that they offered it for the purpose of showing the testamentary intentions of the testator, and also to establish a contract between the caveator and the testator (55).

No offer was made to introduce any evidence tending to show that at the time these declarations were made the testator was of unsound mind or that he was in any abnormal mental condition. The learned counsel for the caveator will scarcely contend that evidence tending to show that the testator made a binding contract with the caveator could be admitted as evidence tending to show that at that time he was incapable of making a contract.

The declarations, not being offered on the question of mental capacity, were clearly excluded by the ruling in Throckmorton *vs.* Holt, 180 U. S., 552. We do not care to follow counsel in their reference to other authorities on this subject. The exact point was raised and determined in that case. The issues there were as to forgery and revocation, but the precise question upon which the case turned was whether the intentions of a testator can be shown by his

statements as to what they were at the time he made the statements; and it was distinctly held that such declarations are incompetent for that purpose, because they are hearsay.

This question, of course, is of no importance now if this court should hold that the caveator was estopped to assail his grandfather's will when he filed his caveat, or that he was precluded from attacking it by his failure to restore what he had received from his grandfather's estate directly and indirectly under the will. It would be important only in case this court should hold that the trial judge erred in taking the case from the jury.

On the whole, it is submitted that the judgment below should be affirmed.

A. S. WORTHINGTON,
Attorney for Defendants in Error.

T. PERCY WOODWARD,
Of Counsel.

No. 63.

CHAP. 394. An act conferring on the supreme court of the District of Columbia jurisdiction to take proof of the execution of wills affecting real estate, and for other purposes (30 Stat., 434).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section four of the act of Congress entitled "An act relating to the supreme court of the District of Columbia," approved June twenty-first, eighteen hundred and seventy, be, and the same hereby is, amended so as to read as follows:

"That all the powers and jurisdiction by law held and exercised by the orphans' court of Washington county, District of Columbia, prior to the twenty-first day of June, anno Domini eighteen hundred and seventy, are hereby conferred upon the supreme court of the District of Columbia. Such powers and jurisdiction shall continue to be exercised by one of the justices of said court holding a special term for orphans' court business, and from his judgments, orders, and decrees there shall be the same right of appeal to the Court of Appeals of the District of Columbia as is given by section seven of the act of Congress establishing said Court of Appeals, approved February ninth, eighteen hundred and ninety-three: *Provided*, That nothing herein contained shall divest said court or said special term or said justice of any power or jurisdiction conferred upon said court or said special term or said justice by existing law."

SEC. 2. That in addition to the jurisdiction conferred in the preceding section of this act, plenary jurisdiction is hereby given to the said court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term; and neither the execution nor the validity of any such will or testament so admitted to probate and record shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons *res judicata*, subject, nevertheless, to the provisions hereinafter contained.

SEC. 3. That all issues of fact hereafter arising in the supreme court of the District of Columbia holding a special term for orphans' court business, including those relating to the execution of the validity of any will or testament, shall hereafter be tried before said justice holding said special term, and that when required for such purpose jurors shall be drawn in the manner now by law provided for the drawing of jurors for service at the special term of the supreme court of the District of Columbia sitting as a circuit court for said District.

SEC. 4. That no will or testament shall be hereafter admitted to probate and record in the said District until the following procedure shall have been followed: Whenever any will or testament shall be presented for probate and record to the said justice he shall direct all of the heirs-at-law or next of kin of the testator, or both, as the case may require, to be summoned to appear before him at a certain day, not earlier than ten days from the date of said presentation; if said summons shall be returned personally served upon all of said heirs-at-law or next of kin, or both, at least five days before said return day, then, if no caveat be filed to said will, the said justice may forthwith admit the same to probate and record. But if any of said heirs-at-law or next of kin be returned "not to be found," then the said justice shall cause not less than thirty days' notice of the application for such probate to be published in some newspaper of general circulation in the District of Columbia, and may order such other publication as the case may require. And upon such notified day, or such subsequent day as the court shall appoint, the said application for probate shall be heard, due proof of such publication being made; and if no caveat be filed the said will or testament shall be admitted to probate and record. In all cases in which all of the heirs-at-law or next of kin of a testator, or both, consent to such probate and record, such will and testament shall thereupon be forthwith admitted to probate and record without the hereinbefore-described proceedings. In all cases in which any of said heirs-at-law or next of kin is an infant or of unsound mind the said justice shall appoint a guardian *ad litem* for said infant or person of unsound mind: *Provided*, That in no case shall any will or testament be admitted to probate and record save upon formal proof of its proper execution.

SEC. 5. That the preceding sections of this bill shall be subject to the following proviso: Any person interested in said probate who at the time of the final decree admitting any will or testament to probate and record is within the age of twenty-one years may file a caveat to said will within one year after he becomes of age; and any person so interested who at the said time was returned "not to be found" and was proceeded against by order of publication, may file such caveat within two years after the date of said final decree; and any person actually served with process or personally appearing in said proceedings may file such caveat within one year after said date.

SEC. 6. That whenever any caveat shall be filed issues shall be framed under the direction of the court for trial by jury: *Provided*, That in all cases in which all persons interested are *sui juris* and are before the court, the issues may be tried and determined by the court without a jury upon the written consent of all such parties. At least ten days prior to the time of trial all the heirs-at-law or next of kin of the decedent, or both together, with all persons claiming under the will, shall be each served with a copy of said issues and a notification of the time and place of the trial thereof. If any of them be an infant or of unsound mind he shall have a guardian *ad litem* appointed for him by the court before such trial shall proceed. If, as to any party in interest, the notification shall be returned "not to be found," the court shall assign a new day for such trial, and shall order publication at least twice a week for a period of not less than four weeks of a copy of the issues and notification of trial in some newspaper of general circulation in the District of Columbia, and may order such other publication as the case may require. And the supreme court of the District of Columbia may from time to time prescribe and revise the rules and regulations for service personally upon such party outside the District of Columbia of a copy of such issues and notification, but personal service upon absent defendants shall in no case be essential to the jurisdiction of the court in the premises. Upon the day notified, or such subsequent day as the court shall appoint, the court shall proceed with the trial of said issues, due proof of such publication and, when required, of such personal service being made, and due opportunity being given to any party in interest to demand other and further

issues. On the trial of any such issue exceptions may be taken to the rulings of the court, which shall be embodied in a bill of exceptions, to be settled and signed by the justice presiding within such time as may be fixed by the rules of practice prescribed from time to time by the supreme court of the District of Columbia in general term, and the said justice shall have the same power to set aside the verdict and grant a new trial that is possessed and exercised by the supreme court of the District of Columbia in cases tried with a jury according to the course of the common law, and as to such trial shall have all other powers now vested by law in the supreme court of the District of Columbia holding a special term as a circuit court. In all cases in which such issues shall be tried the verdict of the jury and the judgment of the court thereupon shall, subject to proceeding in error and to such revision as the common law provides, be *res judicata* as to all persons, nor shall the validity of any such judgment be impeached or examined collaterally.

SEC. 7. That in addition to the power and jurisdiction conferred by this act and by prior laws upon the supreme court of the District of Columbia holding a special term for orphans' court business, said court is hereby given plenary authority to administer also the real estate situated in the District of Columbia of decedents, so far as may be necessary for the payment of debts and legacies, and to distribute among those entitled thereto any surplus proceeds of any sale of real estate made in the course of such administration, and that the bonds hereafter executed of all executors and administrators shall be responsible for the proceeds of sale of all real estate sold by them under the order of the said justice for such purposes of administration: *Provided, however*, That no such sale shall be made unless the same be required for the purposes of paying debts and such legacies as are chargeable upon the real estate, nor until the auditor of the court shall have ascertained and reported a deficiency of personal assets for such purposes, and such report shall be subject to exception.

SEC. 8. That the foregoing sections of this act shall apply only to wills and testaments hereafter offered for probate, and, in cases of intestacy, to the estates of such persons as shall die after the passage of this act: *Provided*, That in the supreme court of the District of Columbia holding a term

for orphans' court business any person interested under any will heretofore filed in said court may offer the same for probate as a will of real estate, whereupon such proceedings shall be had as by this act are authorized in regard to wills hereafter offered for probate.

SEC. 9. That the said justice may authorize and direct collectors heretofore or hereafter appointed to discharge *pendente lite* all or any of the duties of an administrator.

SEC. 10. That the record in the office of the register of wills for the District of Columbia of a duly certified copy, or transcript of the record of proceedings, admitting any will or codicil to probate outside of the District of Columbia; and the record in said office of any will or codicil heretofore admitted to probate in said District, and which shall not have been annulled or declared void according to law prior to the passage of this act, shall be deemed and held, at law and in equity, as of the same and like force and effect as if such will or codicil had been duly proved and admitted to probate and record under and in accordance with the provisions of this act: *Provided*, That the provisions of this section shall not apply to any proceedings at law or in equity pending at the date of the passage of this act, or commenced within one year after the passage of this act, wherein or whereby the validity of such will or codicil is or shall be called in question.

SEC. 11. That the supreme court of the District of Columbia in general term is hereby authorized and empowered to make all such rules of practice as shall be necessary for the exercise of the jurisdiction hereby conferred, and to revise and alter such rules from time to time as it may deem proper.

SEC. 12. That all laws and parts of laws inconsistent herewith are hereby repealed.

Approved, June 8, 1898.